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ABSTRACT

The prohibition of student plagiarism by educational institutions creates problems associated with: (1) communicating acceptable practices for citing the works of others; (2) establishing appropriate penalties for those who do not follow the announced standards; (3) ensuring, through due process, the protection of the rights of those accused of plagiarism; and (4) avoiding violations of copyright law. This guide to institutional policy development considers both the academic and the legal issues involved in plagiarism cases. The first chapter pays specific attention to: (1) the promulgation of comprehensible definitions of plagiarism, (2) the provision of adequate notice of the existence of an institutional policy, (3) the legal importance of determining whether the plagiarism was intentional, and (4) the extent of the contractual nature of the relationship of student to institution. The second chapter looks closely at whether plagiarism is an academic or disciplinary matter and considers students' rights in disciplinary actions. The third chapter focuses on three legal issues involving copyrighted material: the ownership of student-produced plagiarized material, the "fair use" of copyrighted material, and the copyrightability of plagiarized material. Examples of plagiarism provided in Dartmouth College's student handbook are appended. (PGD)

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Legal Aspects of PLAGIARISM

Ralph D. Mawdsley

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1

INTRODUCTION

If the importance of plagiarism were determined by the number of cases or legal articles generated, then the subject would seem to be relatively insignificant when compared to the kaleidoscope of other problems facing educational institutions. However, notwithstanding the dearth of cases and articles, plagiarism is one of the truly unique problems which education must address.

By its very nature plagiarism speaks to the very heart of education because plagiarism touches not only upon the matter of research and scholarship but upon the matter of integrity of those producing works of scholarship. While the precise mission of education may be difficult to define and will vary among different kinds of public and private schools it can certainly be stated that one purpose of education ought not to be the production of graduates who misrepresent the work of someone else as their own. While the matter of which values should be taught will vary among educational institutions, the subject of honesty in academics is a value which ought to be propagated and protected on all campuses.

The process of protecting the academic reputation of an educational institution requires the formation of rules identifying unacceptable conduct and explaining possible penalties for violations of that prescribed conduct. While many rule violations would be considered discipline problems and would be handled through the school's disciplinary process, plagiarism is among a number of rule violations which might affect more than just school discipline; plagiarism may also involve academic penalties such as reduction in grade, loss of course credit or withholding or denial of a diploma. Since plagiarism may touch upon conduct peculiar to academic course requirements as well as conduct violations of acceptable discipline code behavior it is difficult to determine whether plagiarism should be considered an academic problem or disciplinary code violation.

If plagiarism could be both an academic and disciplinary matter than there are questions as to whether the nature of academic penalties might be significantly different from disciplinary penalties so as to influence the type of hearing procedures or review process due a student. More basically, if penalties for academic and disciplinary violations are similar, are differences in procedural and review rights justifiable on the basis of distinctions made in labeling offenses as

academic violations of course requirement as opposed to violations of discipline code standards?

At the most fundamental level some concern must be expressed as to whether students adequately understand the institution's definition of plagiarism. Indeed, it must be queried whether all faculty members at the same school have a fairly consistent understanding of what constitutes plagiarism. Can an educational institution fairly assume that its students will understand all the differing variations of plagiarism or does an institution have a responsibility to furnish specific examples of plagiarism to its student-clientele? Should individual faculty members be permitted to differ as to the definition and course penalty for plagiarism and, if so, can each faculty member enforce meticulously the plagiarism policy stated in his own course syllabus?

Plagiarism not only raises questions of academic integrity and disciplinary action by faculty or the institution but questions regarding liability under the copyright law. While most student plagiarism would be represented in classroom assignments, there is always the possibility that individual student projects might be published. The responsibility of faculty members for the academic integrity of persons with whom they co-author published works could raise interesting questions of copyright liability. Likewise, the indiscriminate use of items from student prepared and submitted term papers might create embarrassing copyright problems where published materials contain plagiarized items. Could even the educational institution employing the faculty member have concerns about liability for copyright infringement? And what role does knowledge of plagiarized material or intent to plagiarize have upon individual or institution liability?

The above concerns raise some of the interesting problems within the spectrum of legal issues identified with plagiarism. The focus of this monograph will be upon identifying critical areas in dealing with plagiarism as well as suggestions for minimizing possible litigable problems.

DEFINING PLAGIARISM

Academic Concerns

Plagiarism "is a kind of theft; one writer steals the ideas or even the actual words of another writer without giving credit where it is due."[1] The problems of plagiary essentially can be reduced to a matter of adequate and appropriate documentation of borrowed material. But for all writers "the boundary between influence and plagiarism will always be vague."[2] Plagiarism can be especially vulnerable to diffi-

culty of definition since ideas, terms, characterizations, story plots and even exact phrases may remain in a writer's consciousness long after the course, or perhaps the knowledge that there was a prior source, has been lost from memory. Although such an occurence would be highly unlikely for most students who complete written assignments in a compressed time frame, the difficulty of separating influence from plagiarism is nonetheless real if a student is to suffer instructor or institutional penalty for plagiarism. Contributing to the student's research and writing problems are difficulties of discerning the differences between "matters of general and common knowledge" which do not have to be documented and "ideas and expressions"[3] from another source which must be documented. "As a rule of thumb, a piece of information that occurs in five or more sources may be considered general knowledge."[4] While the preceding quotation may be helpful it presupposes a thoroughness of research which students may have neither the time nor interest in performing. The result is that plagiarism occurs either because the student assumes from his incomplete research that ideas and expressions are general knowledge or simply because the student appropriates another's information with no conscious thought as to whether it is general knowledge but in the hope that his undocumented appropriation will not be detected.

In considering the problem of defining plagiarism there are two concerns that must be addressed by an educational institution: the first is the nature of the explanation of plagiarism and the second is a consideration as to whether intent to plagiarize should be a factor in determining whether plagiarism violations have occurred. Regarding the first concern, the most basic explanation would be a brief declarative summary statement of varying lengths defining plagiarism in dictionary fashion. For example, the following definitions are typical:

(1) "Plagiarism: Intentionally or knowingly representing the words or ideas of another as one's own in any academic exercise."[5]

(2) "Plagiarism: Expropriation of words, phrases or ideas of another without attribution for the benefit of one who engages in the act of expropriation."[6]

(3) "Plagiarism: This consists of offering as one's own work the words, ideas or arguments of another person, without appropriate attribution by quotation, reference or footnote. Plagiarism occurs both when the words of another are reproduced without acknowledgement, and when the ideas or arguments of another are paraphrased in such a way as to lead the reader to believe that they originated with the writer ...."[7]

The adequacy of such definitions as those stated above depends upon agreement in the minds of everyone who reads them. Because such agreement is not possible, more exhaustive explanations are necessary.

One approach would be to state in a positive manner what every student writer is expected to do.

> You should document your sources whenever
> 1. you use a direct quotation
> 2. you copy a table, chart or other diagram
> 3. you paraphrase a passage in your own words
> 4. you present specific examples, figures or factual information taken from a specific source and used to explain or support your judgments.[8]

A more common practice among some educational institutions has been to include specific examples in student handbooks. A common approach has been to write an original quotation and then furnish a number of undocumented student versions of that quotation which would constitute plagiarism.[9] The following sample typifies what has been done:[10]

> Original Version
>
> Still, the telephone was only a convenience, permitting Americans to do more casually and with less effort what they had already been doing before (Daniel J. Boorstin, The Americans: The Democratic Experience, page 391).
>
> Version A [Plagiarism - No quotation marks or footnote]
>
> The telephone was a convenience, enabling Americans to do more casually and with less effort what they had already been doing before.
>
> Version B [Plagiarism - Footnote but no quotation marks]
>
> Daniel J. Boorstin argues that the telephone was only a convenience, permitting Americans to do more casually and with less effort what they had already been doing before [note 1].

When the above kinds of examples are coupled with author comments explaining the reasons why plagiarism has occurred the advantages are obvious. The school has not only clarified its dictionary-type definition of plagiarism and given better notice of school expectations but it has also demonstrated an attitude of willingness to perform an education service that goes beyond course content. The importance of this service is represented by the following observation.

> Students occasionally reach college without ever having been required to make any acknowledgement of indebtedness to outside sources. They may have been permitted as a consequence of indifference or inadequate supervision on the part of their teachers to copy passages from encyclopedias and other sources without even bothering to place the material in quotation marks, let along indicating where

> it came from. Or, if not going quite that far, they may have gotten by with paraphrases in which most of the significant phrases have been taken over from their sources with no more acknowledgement than an incomplete and slovenly bibliographical note at the end of the paper.[11]

Legal Concerns

Although one might question whether all faculty members would agree whether students have adequately comprehended the meaning of accurate documentation, most would probably agree that proper documentation must be taught at some early point in a student's education if he is to avoid future penalties for plagiarism. Interestingly enough, none of the relatively few legal cases concerning plagiarism have involved the issue of notice. Since many schools may simply make note that plagiarism will be subject to disciplinary action without an attempt being made to define or furnish examples of plagiarism there could be some question whether many students at any college or university properly understand what the institution means by plagiarism. All cases which seem to have reached the level at which they are reported appear to involve "blatant plagiarism."[12] Apparently, plagiarism is a term of sufficient specificity to furnish notice of what kinds of violations would be included within that term[13] even though as a practical matter students may be allowed to progress through an educational system without being adequately instructed in or accurately required to practice proper documentation procedures. The mere use of the term "plagiarism" without further definition or exemplification would probably pass constitutional muster for two reasons: first, the term does furnish "fair warning"[14] of prohibited behavior and therefore is not too vague; and second, plagiarism has a "peculiarly pernicious influence on academic performance and academic life"[15] and courts have traditionally permitted educational institutions greater judgmental latitude in handling academic matters.[16] While it may seem harsh to punish plagiarism by college and university students who have been furnished inadequate or improper instruction on plagiarism at lower educational levels, such a practice is unlikely to warrant judicial intervention[17] on the basis of a student's self-proclaimed ignorance of the meaning of plagiarism. However, the possibility of such students being caught in a school's discipline net might suggest the need for a more detailed statement of plagiarism.[18]

Although the legal concept of notice has not seemed to play any role in reported cases, the question as to whether plagiarism must require the legal element of intent to deceive or defraud has become a significant issue. In the literary world one writer has observed that,

> [w]hat has not changed through time is the ethic of borrowing. Throughout history the act of using the work of another <u>with an intent to deceive</u> has been branded as plagiarism.[19]

However, the issue of intention in plagiarism situations has become a very real issue in educational institutions. Does plagiarism occur everytime there is objective evidence of undocumented borrowing? Or, can plagiarism occur only when there is evidence that the student intended to plagiarize, regardless what the objective evidence may be? Or, should plagiarism include both objective and subjective elements affecting the determination as to whether an offense has occurred as well as mitigation of penalty?

The relationship between intent and plagiarism became the central issue in the leading case of Napolitano v. Princeton University Trustees.[20] Plaintiff Napolitano was a Princeton senior English major who was anticipating attending law school. During her four years at the university Napolitano had maintained a 3.7 out of 4.0 grade point average, despite devoting long hours to managing the men's baseball and women's basketball teams.[21] During the first semester of her senior year plaintiff elected to take a course entitled "The Spanish American Novel," not to satisfy credits for her degree but "merely to become more familiar with Spanish literature."[22] One of the course requirements was a critical analysis term paper written in Spanish of one of the works read for the course on a topic chosen by the student but to be approved by the Professor (Sylvia Malloy). Because of time constraints in pursuing other academic requirements, plaintiff did not seek approval of her topic until December 16, 1981, less than a month before the final due date for the paper, January 13, 1982. Professor Malloy suggested that plaintiff read a book which had been placed on library reserve at the beginning of the Fall Semester.

On or about January 21, 1982 when Professor Malloy began to grade plaintiff's paper she "'sensed there was something wrong' and wrote 'Is this yours?', in Spanish, on the margin."[23] Upon completing her review of plaintiff's paper, the professor contacted Dean Peter Onek, an Assistant Dean of Student Affairs at Princeton, who advised that plaintiff be awarded a grade of "Incomplete" and that a letter formalizing the charges of plagiarism[24] be sent to him. Between receipt of the charges and the first meeting of the Faculty-Student Committee on Discipline (COD), Dean Onek met with plaintiff on four occasions to discuss the written and unwritten procedures of the COD. Plaintiff was unanimously found guilty of plagiarism and the COD voted to withhold her diploma for one year. The President of Princeton University upheld the COD decision on March 1, 1982 and plaintiff filed suit against the university on April 22, 1982.[25]

Although a number of issues were litigated at the trial one key issue concerned whether intent to plagiarize was a necessary element of the offense. The 1978 edition of "Rights, Rules and Responsibilities" provided that the absence of intent was not a defense to a charge of plagiarism. The 1980 edition deleted the "absence of intent" phraseology and inserted the word "deliberate" in the definition of plagiarism.

> Plagiarism. The deliberate use of any outside source without proper acknowledgement. "Outside source" means any work, published or unpublished, by any person other than the student.[26]

It was just such change on language which prompted the trial court to remand the matter to COD with a specific question as to whether "the use of the word 'deliberate' and the removal of the 'absence of intent' language dictated that the proscribed plagiarism must have been with the intent to pass off the submitted work as the student's own."[27] Upon remand COD unanimously found plaintiff guilty of plagiarism and, with one abstention, imposed the same penalty of withholding her degree for one year.[28] The finding of plaintiff guilty of intentionally plagiarizing is especially important since she did in fact cite the source in question on six occasions in footnotes.[29] That fact plus her contention that Professor Malloy had recommended the source and thereby should not have been surprised at plaintiff's extensive use of it argued against intentional plagiarism according to plaintiff.[30] Instead the court seemed to rely on an objective standard finding that plaintiff had attempted to pass off the borrowings from her source as her own.

> While plaintiff persists in her argument that she did not intend to plagiarize and that there is nothing in the proofs to show that she did so intend, the mosaic itself is the loudest argument against her.[31]

Among the items cited as evidence of plagiarism were the following:

(1) A few statements from the source had been put in quotation marks but not the rest ....

(2) The use, in the paper, of phrases such as "it is evident that," "it is important to note that," "one can assume that," etc. suggest that what follows is Ms. Napolitano's own thoughts and words, when in fact, in virtually all instances, what follows is words borrowed from the one source without attributions.

(3) In several instances, there are quotes from the novel which is the subject of the paper. These quotes were used by the secondary source . . . to illustrate various points. In making these same points (usually using the words of the secondary source), Ms. Napolitano used the same quotes but changed the page numbers of the quotes to correspond to the edition of the novel used in the course. This gives the appearance that Ms. Napolitano had found the quotes herself in the novel, which, in fact, she did not.

(4) The verb tenses in the material borrowed from the source were all changed to the present tense for the sake of consistency in the paper.
(5) Small words and phrases from the borrowed source were deleted in cases where these words may have seemed too technical or awkward.[32]

The above items are not only informative regarding the establishment of an objective standard but are illustrative of the kinds of student conduct which can be considered to be plagiarism.

However, educational institutions need to be advised that the issue of whether intent will be part of plagiarism is not so much a separate judicial doctrine as a judicial interpretation of the institution's own handbook. In an unreported case, Wait v. University of Vermont,[33] the university in its student handbook characterized academic dishonesty as "any acts which, if successful, would deceive, cheat, or defraud so as to promote, or enhance one's academic standing ...."[33] The reference to "fraud" prompted the court to define fraud with its normal civil and criminal connotations.[34] In addition, the university handbook noted, "Plagiarism occurs (when materials are presented) in such a way as to lead the reader to believe that they originated with the writer."[35] The handbook went on to state that a student could be found guilty of an academic offense by the University Hearing Panel only if "it is satisfied, beyond a reasonable doubt, that the student's actions meet the description of academic dishonesty ...."[36] Finally, the handbook stated that the Hearing Panel could "consider extenuating circumstances, including intent, in its recommendations."[37] The Wait case demonstrates the collage of confusing statements which can serve to contradict an institution's claim that intent should not be a factor in determining plagiarism. There is little wonder in Wait that the court observed, "it is clear from the facts before us that the [Hearing Panel] could not have found beyond a reasonable doubt that plaintiff intended to deceive his professor . . . because there was no evidence of intent to deceive before them."[38] Wait serves to illustrate the legal problems which can be created when language in disciplinary procedures appears to alter the stated definition of plagiarism.

The issue regarding intent to deceive as a necessary element for plagiarism highlights the importance of understanding the nature of the legal relationship between an educational institution and its students. Clearly the most commonly accepted legal statement of a relationship is contract in which,

> [t]his contract is conceived of as one by which the student agrees to pay all required fees, maintain the prescribed level of academic achievement and observe the school's disciplinary regulations, in return for which the school agreed to allow the student to pursue his

course of studies and be granted a diploma upon the successful completion thereof.[39]

In Napolitano, plaintiff alleged both breach of contract and violation of the law of associations. The court rejected the argument that the law of associations "delineates completely the relationship between a student and a university."[40] While the contract would appear to be a viable theory in student-educational institutions relationships it does admit of some practical problems, not the least of which is determining the language of the contract. A contract can include not only written school handbooks, published rules and regulations but also oral statements by faculty[41] as well as academic custom, usage and tradition.[42]

The legal issues relating to a school's academic rules and regulations can involve a number of factual problems. One problem concerns the application of faculty or student conduct to school rules or regulations where there have been changes in school catalogs or inconsistencies within the same catalog. In Blank v. Board of Higher Education of City of New York[43] the court ordered Brooklyn College to confer upon the plaintiff the degree of bachelor of arts. This unusual judicial remedy was invoked because of the college's refusal to grant credit for courses taken at another institution. The court's rather heavy handed treatment of the college resulted from the school's reliance upon a newly added provision in the school catalog for the year following the one in which the plaintiff should have graduated and upon one part of the catalog when other portions of the catalog made differing statements.

The extent to which educational institutions can alter the programs offered to their student-clientele has frequently raised the isssue of the nature of the relationship between student and institution. In Marquez v. University of Washington[44] plaintiff-student relied upon the AALS prelaw handbook describing defendant's law school as having "Special Programs" including "academic aid . . . for students of minority ethnic groups." Prior to plaintiff's first year in its school, defendant had a formal tutoring program but because of dissatisfaction with the tutors and concern with stigmatization, the program had been replaced by a voluntary assistance program. In response to plaintiff's allegation that defendant's handbook required a formal tutoring program the court noted that "the concept of a binding, absolute, unchangeable contract is particularly anomalous in the context of post-graduate work."[46]

The effect of attempting to force the student-institution relationship into a contract mold was illustrated in Slaughter v. Brigham Young University.[47] In Slaughter, the plaintiff-student was expelled from the university for listing, without permission, his advisor as a coauthor of two articles written by plaintiff. He was found to have violated the Code of Student Conduct requiring that students observe

"high principles of honor, integrity and morality," and also that they "be honest in all behavior. This includes not cheating, plagiarizing, or knowingly giving false information."[48] The trial court found that plaintiff had been impermissably dismissed and instructed the jury that the plaintiff "was entitled to damages based on what he would have earned had he received his doctorate."[49] In reversing the $88,283 jury verdict for plaintiff, the appeals court observed that contract law cannot be "rigidly applied in all its aspects" and the uniqueness of the student-university relationship permits a number of legal theories to be considered.[50]

Regardless whether court sees institution-student relationships as grounded in some form of contract,[51] the law of association[52] or student expectation,[53] it is doubtful that the addition or modification of the definition of plagiarism during the time the student is in attendance would be recognized as a litigable cause of action. Where plagiarism is identified only as an item for academic as opposed to disciplinary punishment,[54] it is possible that differing oral interpretations of plagiarism by various faculty members or administrators may undercut the school's ability to punish a plagiarizer.[55] Probably a better course of action would be to adopt a comprehensive plagiarism policy complete with examples to be published in a student handbook. Such a policy can be found in the Appendix to this monograph. Since the legal basis for the student-institution relationship is by no means clear and since plagiarism violations may result in penalties from grade reduction to expulsion, there should be a compelling interest by a school to standardize and make specific its expectations for academic honesty.

NOTES

1. S. Weidenborner & D. Caruso, Writing Research Papers: A Guide to the Process 97 (1982).

2. P. Shaw, Plagiary, American Scholar 325, 327. This article is well worth reading since it purports to represent the status of plagiarism in the commercial writing field. Although not probably applicable to educational institutions, the author asserts that in the literary world "plagiarism has come to be regarded as a relative phenomenon--one to which disgrace no longer attaches."

3. A. Winkler & J. McCuen, Writing the Research Paper 40 (1985).

4. Id.

5. Academic Dishonesty (University of Maryland Handbook).

6. Bulletin (Duke University).

7. The Cat's Tale: A Student's Guide to the University of Vermont (University of Vermont).

8. J. Crimmon, Writing With a Purpose 499 (1984).

9. Excellent examples of this approach can be found in Bond, Seymour & Stewart, Sources: Their Use and Acknowledgement 24-37 (Dartmouth College Rev. 1976) and Rights, Rules and Responsibilities 43-50 (Princeton University).

10. See supra note 6 at 499-500.

11. See supra note 9, Bond, Seymour & Stewart, at 4.

12. See supra note 3 at 40. Blatant plagiarism is defined as the "conscious and deliberate stealing of another's words and ideas, generally with the motive of earning undeserved rewards."

13. Courts are willing to give considerable latitude to educational institutions in stating offenses for which discipline can be awarded. For example, in Carr v. St. John's Univ., 187 N.E.2d 18 (N.Y. App. Div. 1962) an expulsion was upheld for two students married in a civil ceremony and two acting as witnesses when the university enforced its regulation stating that "in conformity with ideals of Christian education and conduct the university reserved the right to discuss a student at any time on whatever grounds the university

judged advisable." See also Alex v. Allen, 409 F. Supp. 379 (W.D. Pa. 1976) ("flagrant disregard of teachers," "loitering in areas of heavy traffic," "rowdy behavior in the area of heavy traffic."); Linwood v. Board of Educ. 463 F.2d 763 (1972) ("gross disobedience," "misconduct"); In re K.P., 514 P.2d 1131 (Colo. 1973) ("behavior which is inimicable to the welfare, safety or morale of other pupils."). Contra Jacobs v. Board of School Comm'rs, 490 F.2d 601 (7th Cir. 1973), vacated as moot 420 U.S. 128 (1975) ("likely to cause significant disruption" was to vague); Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973) ("Obscene" was to vague).

14. Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

15. Wait v. University of Vermont, No. 82-247 (D. Vt. 1982), at 10.

16. See Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978) (In Horowitz a student placed on probation for her poor clinical performance was told she would be dropped from school and not be permitted to graduate, even though she was in the final year of medical school, unless her performance showed "radical improvement." After she had failed a special set of oral and written examinations she was permitted to take in order to demonstrate proficiency, she alleged due process violations, but the Court held that the various levels of the review process had furnished her adequate notice of the school's academic expectations. Because academic dismissal requires subjective and evaluative judgments unlike behavior cases, dismissal for academic reasons requires less stringent fact-finding procedures).

17. Courts have historically absented themselves from educational matters pertaining to academics. See Debra P. v. Turlington, 730 F.2d 1405 (11th Cir. 1984) (competency test for graduation and prior racial discrimination); Board of Educ. v. Ambach, 469 N.Y.S.2d 619, 457 N.E.2d 775 (1983) (competency tests and remedially handicapped children); Crook v. Baker, 584 F. Supp. 1554 (E.D. Mich. 1984) (attempt to rescind university degree); State v. McLeod, 605 S.W.2d 160 (Mo. Ct. App. 1980) (withholding diploma for being one-half credit short as being arbitrary).

18. One of the very best model plagiarism statements, including excellent examples, can be found in Dartmouth College's Sources: Their Use and Acknowledgement 24-37 (1962). The Darthmouth College model has provided the pattern for the plagiarism policy of such eminent institutions as Princeton University Rights, Rules, and Responsibilities 43-50 (Princeton University 1984). See also Winkler, supra note 3 at 41-2; McCrimmon, supra note 8 at 499-500; Weidenborner, supra note 1 at 98-100.

19. Supra note 2 at 327 (Emphasis in original).

20. 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982), affirming 453 A.2d 279 (N.J. Super. Ct. Ch. Div. 1982).

21. Education: Questioning Campus Discipline, Time Magazine, May 31, 1982, at 58.

22. 453 A.2d at 280.

23. Id. at 267.

24. In her charge the professor "pointed to thirty-seven places where Napolitano used the exact language of the secondary source without attribution." 6 Lex Collegii 1 (1983).

25. Plaintiff's 14-count complaint included a wide range of legal theories: violations of N.J. Const. (1947), art. I, § 1; contract; law of associations; fifth and fourteenth amendments; section 1983 of the Civil Rights Act; defamation; intentional infliction of emotional distress; invasion of privacy; malicious interference with prospective economic advantage; and malicious interference with contractual relationship. See 453 A.2d at 268.

26. 453 A.2d at 281 (emphasis supplied). The most recent "Rights, Rules and Responsibilities" (1984 edition) has eliminated the word "deliberate." Supra note 16 at 42. In addition the 1984 edition has added the following language relative to "False Data."

> In determining whether academic fraud has occurred the Committee will take into account whether the student should reasonably have understood that his or her actions were in violation of University regulations. While failure to fulfill the general requirements for acknowledgement of sources in academic work may not necessarily involve academic fraud, any such failure will be considered an academic infraction and will normally result in displinary action.

27. 453 A.2d at 281.

28. Id. at 270.

29. Wait, supra note 15.

30. Id.

31. 453 A.2d at 276.

32. Id.

33. Wait, supra note 15.

34. See Id. at 7, 12-13 n.n.6, 7.

35. Id. at 7 (emphasis in original).

36. Id. (emphasis in original).

37. Id. (emphasis in original).

38. Id. at 8. However, despite the fact that the university had not followed its own guidelines the court affirmed plaintiff's suspension because plaintiff had been afforded appropriate due process and not been able to meet "his burden of demonstrating that the decision of the [Hearing Panel] was clearly arbitrary or capricious." Id. at 9.

39. Perretti v. Montana, 464 F. Supp. 786 (D. Mont. 1979), quoting Note, Expulsion of College and Professional Students Rights and Remedies, 38 Notre Dame L.J. 174 (1962).

40. 453 A.2d at 272. The advantage of the theory of law of associations is that it provides "protection of the members valuable personal relationship to the association and the status conferred by that relationship.... The loss of status resulting from the destruction of one's relationship to a professional organization of times may be more harmful than a loss of property of contractual rights." Id. at 271. For a case where this theory was applied see Higgins v. American Society of Clinical Pathologists, 238 A.2d 665 (N.J. 1968)

41. Some have determined that the basis for the student-school contract is really the reasonably expectations of the parties. For example, in Giles v. Howard Univ., 428 F. Supp. 603 (D.D.C. 1970) the court upheld the dismissal of a student for poor grades with the following rationale:

> After reading the Student Promotions Policy, the reasonable expectation of any student is that if he fails a course and does not make up the deficiency in the Directed Student Program, he can be dismissed or can be retained with any reasonable condition.... Under this interpretation, the plaintiff has failed to address any evidence of a violated contract right.

Id. at 604 (emphasis added).

42. The Supreme Court referred to "usages of the past" in Perry v. Sindermann, 408 U.S. 593 (1977) and more recently in NLRB v. Yeshiva, 444 U.S. 672 (1980) to the historical evolution of faculty governance in ruling that faculty at "mature" private universities are managerial employees who may not organize to bargain.

43. 273 N.Y.S.2d 796 (N.Y. Sup. Ct. 1966). New catalog provisions cannot be applied retroactively if the catalog under which a student entered made certain provisions that some catalog provisions would not be subject to changes. University of Texas Health Science Center at Houston v. Babb, 646 S.W.2d 502 (Tex. Civ. App. 1982). However, see Basch v. George Washington University, 370 A.2d 1364 (D.C. 1977) where a court upheld defendent's future tuition increases of $1800-7000 per year despite written statements in the medical school bulletin that future tuition increases were estimated at $200 a year. The court applied the strict rules of contract construction to decide that the bulletin language was not precise enough to bind the medical school and that therefore the students had no recovery or remedy at all.

44. 648 P.2d 94 (Wash. Ct. App. 1982)

45. Id. at 96.

46. Id. at 97. See also Peretti v. Montana, 464 F. Supp. 789, 787 (D. Mont. 1979).

> Only that which is reasonable may be upheld. Certainly in the period of time between a student's matriculation and graduation, an educational institution, which is a living changing thing, may not reasonably be expected to remain static, and conversely, change may reasonably be expected. Hence, each statement in a publication of what of what now is true does not necessarily become a term in the contract between the school and the student.

47. 514 F.2d 622 (10th Cir. 1975).

48. Id. at 624.

49. Id. at 626. The trial court ruled on a substantial performance theory that plaintiff would have satisfied all academic requirements and completed his doctorate but for the dismissal.

50. Id.

51. The three traditional forms of contract are an express contract, a contract implied in fact and a contract implied in law. Contemporary contract theory finds fewer differences between the latter two forms but distinctions continue to persist between express and implied contracts. See Corbin on Contracts § 18 (1952).

52. See Tedeschi v. Wagner College, 404 N.E.2d 1302, 1305 (N.Y. App. Div. 1980).

> Contract theory is not wholly satisfactory, however, because

the essentially fictional nature of the contract results in its generally being assumed rather than proved, because of the difficulty of its application, and because it forecloses inquiry into, and a balancing of, the countervailing interests of the student on the one hand and the institution on the other.... The law of association accords judicial relief to an association member suspended or expelled without adherence to its rules.

53. Eden v. SUNY, 374 N.Y.S.2d 686 (N.Y. App. Div. 1975) (state budget office decision to postpone opening of new program in podiatric medicine after students had been admitted and had foregone opportunities to enroll elsewhere resulted in court order to open program); Behrend v. State, 379 N.E.2d 617 (Ohio Ct. App. 1977) (a university decision not to pursue accreditation of its School of Architecture after statements had been made to that effect to students by faculty and administrators resulted in award of monetary damages); Peretti v. Montana, 464 F. Supp. 784 (D. Mont. 1979) (cancellation of a six unit course in aviation without giving students enrolled in program an opportunity to complete it resulted in damages.)

54. A plagiarism policy may be constructed as so to permit individual faculty member interpretation. See e.g., The Liberty Way 17 (Liberty University 1984-86),

> In the instances of papers written outside class, academic honesty shall include plagiarism. Plagiarism may be specifically defined for purposes of any course by the instructor involved. Unless it shall otherwise be defined, plagiarism shall include failure to use quotation marks or other conventional marking around material quoted from any printed source. Plagiarism shall also include paraphrasing a specific passage from a specific source without properly referencing the source. (Emphasis added).

55. The effect of oral statements upon institutional policies is problematic and courts are not consistent on treatment of such statements. Compare Healy v. Larsson, 323 N.Y.S.2d 625 (N.Y. Sup. Ct. 1971) (oral representations made to students during "consultation with dean, director of admissions, acting president, a guidance counselor and chairman of a department of the community college" created obligation to award a degree) with Olsson v. Board of Higher Education, 402 N.E.2d 1150 (N.Y. 1980) ("representation" or "information given" by faculty member regarding number of comprehensive examinations to receive passing grade was merely professor's "unfortunate slip-of-the-tongue" and not binding on the college).

2

PENALIZING PLAGIARISM: ACADEMIC OR DISCIPLINARY VIOLATION?

Plagiarism presents a unique legal problem because although plagiarism generally occurs in an academic setting it may involve penalties comparable to those awarded for disciplinary misconduct violations, such as theft or vandalism. It is not unusual for academic and disciplinary violations to have separate hearing and review procedures on the assumption that there is a "significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct."[56] Whether this alleged difference should exist at all has been the topic of considerable discussion.[57] It can certainly be argued that academic penalties carry the potential for a greater range of penalties than misconduct. Results will vary from one school to the next but disciplinary penalties such as reprimands or weekend campuses may have no impact on a student's academic record; however, confirmed plagiarism very probably would result in at least a reduced course grade, if not course failure and possible suspension or expulsion from the educational institution, with resulting negative effect on all grades. While disciplinary action for misconduct very often does not become part of the record sent to prospective employers or graduate schools, a student's course grade achievements are part of a record invariably requested. Thus, from the students point of view any alleged differences between academic and conduct violations may be more imagined than real.

The difference between academic and disciplinary violations has been given judicial cognizance in Board of Curators of University of Missouri v. Horowitz.[58] In Horowitz a medical student in her last year of medical school was dismissed and not permitted to graduate because of below average ratings on clinical work, erractic attendance and lack of personal hygiene. The issue before the Supreme Court was whether the student's dismissal for alleged academic deficiencies entitled her to due process rights required for disciplinary (misconduct) reasons. The court of appeals had decided in the student's favor finding that the dismissal had been "effected without the hearing required by the fourteenth amendment."[59] In overruling the court of appeals the Supreme Court drew a sharp line between academic and disciplinary determination and concluded: "The determination whether to dismiss student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.... Court are particularly

ill-equipped to evaluate academic performance."[60]

While the separation of academic and disciplinary violations may seem to represent a distinction without a difference (at least from the student's point of view) it is difficult to determine what policies underlie greater deference to educational institutions in academic but not disciplinary areas. Perhaps as one writer has suggested "the most important reason for judicial deference to the autonomy of institutions of higher education is that such autonomy is a variant or component of the larger idea of academic freedom which is vital to a free society."[61] In Napolitano the court cited with approval Horowitz:

> The educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students; one in which the teacher must occupy many roles--educator, advisor, friend, and, at times, parent-substitute . . . we decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship.[62]

The irony of the situation is that the academic process which is buttressed on the faculty member's side by freedom from disciplinary procedural requirements in defining, diagnosing and penalizing plagiarism breaks down on the student's side when his relationship with a faculty member, and even the institution, can be damaged, or severed altogether, by evidence of plagiarism.

Since courts recognize differences between academic and disciplinary violations, can an educational institution immunize itself against close judicial scrutiny and rely on the judicial deference in academic matters by labeling those matters which it considers academic? In other words, as related to the subject of this monograph, will plagiarism always necessarily be considered to be an academic violation? The Napolitano court rejected plaintiff's claims that she was being disciplined for misconduct and the penalty of deferral in granting her degree was the result of that misconduct.

> We believe that the infraction for which plaintiff was penalized constituted an academic offense under University regulations and therefore must be considered in the light of an academic disciplinary action on the part of the University authorities. It is clear that plaintiff was charged with plagiarism--in other words, that plaintiff attempted to pass off as her own work, the work of another. That act, if proven, constituted academic fraud. We do not view this case as involving an appeal from a finding of general misconduct; instead, we are concerned with the application of academic standards by the authorities at Princeton.[63]

However, in Wait v. University of Vermont,[64] the federal district court agreed with plaintiff-student that the University could not "thwart constitutional standards of review to which proceedings are subjected by its characterization of the proceedings as either disciplinary or academic."[65] Nonetheless, the court concluded that it "will not usurp the prerogative of the University to classify such offenses as it sees fit provided they comport with the limits imposed by the Due Process Clause."[66] The Wait court determined that because of plagiarism's "peculiarly pernicious influence on academic performance and academic life . . . the definition of the offense and the determination of the sanctions should be the products of the 'academic decisionmaking' the Court sought to protect in Horowitz."[67]

But Wait raises a potential question as to whether an educational institution's freedom to classify offenses as "academic" might be limited by the seriousness of the penalty imposed. The recent case of Corso v. Creighton University[68] raised the question as to whether a university could rely on its own interpretation of what constitutes an academic offense for purposes of avoiding certain university discipline procedures. The university student handbook provided that, "[i]n all cases where misconduct may result in serious penalties, all procedural safeguards are observed and the student has the privilege of a hearing before the University Committee on Student Discipline."[69] Plaintiff Corso was a first year medical student who had been accused, along with other students, of cheating on his first year finals. Plaintiff vigorously denied any involvement in cheating and was denied his request "for an opportunity to appear before any committee that would make findings concerning his status with the university."[70] Instead, the dean of the medical school conducted his own investigation, along with interviews of a 20-25 medical students, with the result that of those students relatively equal in culpability with plaintiff, three were suspended, one was given the option of resigning or being expelled, one was placed on probation for suspicion of cheating, and Corso was expelled. The position of defendant university was that the student handbook created separate formats for handling academic verus nonacademic offenses, the former to be dealt with by the deans of the particular schools and the latter by the university committee on student discipline. The core of the university's defense was that "the Medical School regarded the matter (cheating) as an academic disciplinary matter."[71] The federal district court found for plaintiff because it concluded Corso had really been expelled for his lying about the cheating, rather the cheating itself, and lying would be a "nonacademic offense."[72] The appeals court also found for plaintiff but specifically rejected the district court's "division of the incident into two distinct disiplinary matters."[73] The court of appeals was willing to recognize the right of the university to divide offenses into academic and nonacademic and prescribe separate procedures for each kind of offense, but "all cases involving a serious penalty"[74] had to permit a hearing before the University Committee.

On its surface Corso is nothing more than a simple contract case whereby the defendant university is prohibited from treating students in a manner "inconsistent with the contract terms read as a whole."[75] But in a broader perspective Corso represents the pervasive problem courts have in addressing educational problems characteristically identified as academic. The Corso set of facts allowed the appeals court to accomodate two significant policy interests: permit the university to determine the difference between academic and nonacademic offenses; and permit the student an opportunity to defray the harmful effects to his career resulting from a determination that an academic violation has occurred.

Corso cannot be read to suggest that there is some minimal form of due process required in private schools before a student can be expelled for academic dishonesty. In the absence of the specific handbook provision,[76] it is doubtful the Corso court of appeals would have been able to rule in plaintiff's favor, without agreeing with the reasoning of the district court; but to do so would make an educational institution's academic verus nonacademic separation of offenses subject to judicial scrutiny,[77] something which the court of appeals appeared loathe to do. What Corso does suggest is that whereas courts might be willing to defer to an institution's separation of offenses into academic and nonacademic, they will not necessarily defer to that institution's interpretation of its own handbooks.[78]

Creighton University's Student Handbook was not significantly different from other institution's handbooks in that separate procedural formats were set forth based upon the distinctive between an offense being classified as academic or nonacademic.[79] The question that Corso leaves unanswered is whether the absence of the "serious penalty" provision in the Creighton University Student Handbook would have prevented the trial and appeals courts from granting plaintiff any remedy at all. Does an institution's freedom to determine what constitutes academic offenses immunize the school from judicial scrutiny if academic offenses only are involved? If academic violations can result in long-term suspension or expulsion similar to penalties for disciplinary violations, how divergent can hearing and review procedures be between the two kinds of violations? Notwithstanding the judiciary's tendency to sustain in academic matters, is there some minimal due process required in academic violation situations to assure that there has been a minimal level of fairness in treatment? How much should the judiciary be permitted to inquire into institution handling of plagiarism complaints without intruding into the academic integrity of an educational institution and blunting its attempt to protect the quality of its academic reputation? Because of plagiarism's uniqueness in containing elements of both academics and conduct, the balancing of interests required of courts in academic dishonesty cases, such as plagiarism, serves to test judges' ability to blend applicable constitutional standards with the academicians' judgment.

Constitutional Considerations

Educational institutions where constitutional standards form operable constraints on decision-making have had to respond to judicial decisions mandating due process procedures in academic discipline situations. Any procedural rights to which a student may be entitled under the fourteenth amendment are predicated upon being deprived of either a liberty or property interest. In Horowitz the Supreme Court avoided addressing the question regarding the contents of such interests by "assuming the existence of a liberty or property interest."[80] Such an assumption neither answers the question as to whether a liberty or property interest exists at all nor the question as to which of the panoply of procedural rights a student is entitled in an academic discipline situation. Property interests "are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[81] Such entitlement has been found in state statutes,[82] contract relationship between the student and his school,[83] and custom or practice.[84] Generally, however, courts have been reluctant to find a property right for students in continued education.[85] This reluctance undoubtedly reflects a judicial attitude of academic abstention where matters of academic freedom are at stake[86] while nonetheless providing a hearing with a modicum of "informal give-and-take"[87] so that students have an opportunity to explain their behavior in an academic dismissal hearing.

A student's liberty interest relates to his "good name, reputation, honor, or integrity"[88] and precludes the imposition of a "stigma" without due process of law.[89] In Horowitz the Court was clear that "the mere fact of dismissal, absent some publication of the reasons for the action" would not amount to a stigma infringing one's liberty.[90] However, courts more recently have considered suspensions or expulsions for academic dishonesty to involve liberty interests.[91] A recent attempt by the University of Michigan in Crook v. Baker[92] to rescind a master of science degree on the basis that the student had fabricated data underlying his thesis was held to involve both property and liberty interests. The student's property interest was grounded in his "claim of entitlement to his degree"[93] and his liberty interest was found in the loss of "good name, reputation, and integrity"[94] as tied to rescission of the degree. The Crook court announced a "stigma plus" test where liberty interests are related to defamatory conduct.

> For a liberty interest entitled to procedural protections to be found on the basis of defamatory conduct, that conduct must, in addition to imposing a stigma, be accompanied by the deprivation of a right previously held under state law, or result in an alteration of legal status, which justifies the invocation of procedural safeguards.[95]

Simply determining that property or liberty interests exist does not decide what process is due in academic disciplinary cases. The United States Supreme Court in Matthews v. Eldridge[96] posed a three-pronged test which is the standard of due process analysis.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[97]

It is unusual for courts in academic dishonesty cases to discuss the Eldridge factors in detail. The existence of a property or liberty interest as reflected in some form of academic discipline will normally satisfy the first factor.[98] Even in private educational institutions where constitutional standards would not apply, courts are able to find interests akin to liberty or property in the student-institution contract or by means of the law of association.[99] It is the second factor, risk of erroneous deprivation, which generates the most discussion about due process in academic dishonesty situations.

The specific due process procedures to which a student is entitled in plagiarism or other forms of academic dishonesty must be set against a backdrop of judicial concern about adversarial setting for resolution of academic problems. In Mary M. v. Clark[100] a court observed in reviewing a student dismissal from a state supported university for cheating on an examination:

> We concur with the policy considerations enumerated in cases dealing with student discipline which recognize that the student's welfare is best served by a nonadversarial setting which emphasizes the educational functions of disciplinary proceedings.[101]

In Jansen v. Emory University[102] another court commented regarding dismissal of a student from a private university for poor grade performance:

> Plaintiff is correct in observing that the traditional rule of nonintervention in academic matters does not apply to review of disciplinary actions by educational institutions. ... As long as the decision to dismiss Jansen was essentially academic and neither alleged nor shown to be a mere pretense to punish him for disciplinary infractions, it is not subject to judicial review as a breach of the educational contract.[103]

Judicial policies of abstention in, and nonadversarial settings for

academic matters should not be interpreted to mean that certain procedures are not due students prior to discipline for academic offenses. There are six different procedural rights that courts have identified may be applicable to cases of academic dishonesty such as plagiarism: notice; right to counsel; cross-examination; right to a hearing; reasons for a decision; and an appeal process.

Notice

Since academic dishonesty cases generally receive a lesser degree of scrutiny from disciplinary misconduct cases, requirements for notice would seem to be less formal. However, in Jaska v. Regents of University of Michigan,[104] a federal district court noted in a dismissal case for cheating that, [t]he notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education."[105] It should also be added that Jaska interpreted Horowitz to indicate that "cheating should be treated as a disciplinary matter,"[106] as opposed to academic. Generally, the better course of action would be to furnish a student with a written statement of allegations regarding plagiarism. In most cases, notation of plagiarism on the student's work should constitute adequate notice. But, as in Napolitano,[107] the written notations will invariably be followed up with conferences and memoranda. While it might be possible for a student to be disciplined without knowledge of what he had plagiarized, it seems highly improbable that such would be the case.[108] There is some authority that charges of academic dishonesty do not have to be in writing even if school practice would have required it because "such a violation of internal rules does not establish a cognizable constitutional violation"[109] Although there is no clear indication as to what constitutes a timely notice, it would seem that the only requirement would be a reasonable amount of time to allow a student to prepare his defense.[110]

Right to Counsel

A far more persistent problem in academic dishonesty cases involves the student's right to counsel and the role of counsel during the academic hearing. Absent a student handbook provisions permitting legal counsel at a hearing there is no clear indication that constitutional due process requires the presence of an attorney for the reason that "a school is an academic institution, not a courtroom or administrative hearing room."[111] The Napolitano court[112] refused to expand the University's practice to include an attorney because "the academic community's control over its own affairs would be unjustifiably limited."[113] In Napolitano, Princeton University had a provision permitting a student to select an advisor from within the academic community to appear with her at the academic hearing.[114] Absent a written assurance of representation by an attorney or non-legal

advisor, there does not appear to be a constitutional requirement of representation on behalf of the student.[115]

Notwithstanding the apparent absence of a due process requirement of representation, there are several factors various courts have considered in determining whether the student should have some form of representation. In Napolitano, the court referred to the absence of counsel representing the university at the hearing as part of its rationale for ruling against the student's claim to legal counsel.[116] Courts have also been influenced by the effect which an attorney might have had on the student's behalf at the academic hearing (the second Eldridge factor). In Jaska v. Regents of University of Michigan,[117] the University refused to allow the plaintiff-student to bring a representative to the hearing. In ruling against the student the federal district court identified three items to support its conclusion:

(1) "The Manual of Procedures for the Academic Judiciary is written in plain English and is comprehensible to the average college student."[118]

(2) "The University did not proceed against plaintiff through an attorney or other representative."[119]

(3) The hearing was not "subject to complex rules of evidence or procedure."[120]

The presence of the second or third items above would probably require some form of representation for the student.[112]

Even where a student has representation at his hearing, the student can still prevail if the role of his representative is unreasonably restricted. In Clayton v. Trustees of Princeton University,[122] the student's representative (a student and not an attorney) was informed by a member of the Honor Committee that the role of the representative was no "that of an attorney for the defense" but rather "to make certain that a 'balanced' picture was presented."[123] In ruling for the student the Clayton court noted that such undercutting of loyalty to the plaintiff and frowning on partisanship "materially affect[ed] the accused's rights under the Honor Constitution."[124] In Crook v. Baker[125] plaintiff was permitted to have an attorney at his hearing regarding rescission of his degree, but the severe restrictions placed on his attorney in cross-examination and in objecting to committee procedures "greatly increased the risk of erroneous deprivation because the facts underlying the Department's charges were highly disputed and the credibility of witnesses was at issue."[126] The court's conclusion in Crook was aided by misrepresentation of the university's general counsel regarding his function, misstatements about plaintiff's burden of proof, and misdirections to plaintiff's attorney about his function in representing plaintiff.[127]

In summary a student's right to counsel, or at least a non-legal advisor of his choice, will be affected by two factors: the educational institution's use of legal counsel and restrictions placed on the student's ability to challenge the proceedings against him and evidence received at the hearing. This latter concern raises the issue of cross-examination.

Cross-examination

Of all constitutional privileges none is more valuable to the accused than the right to question those who furnish evidence against him. Even where an attorney or other advisor is not present a court will take note of the effectiveness of the student's ability to cross-examine and expose flaws in the school's case.[128] In Napolitano plaintiff alleged as one of her errors in her academic hearing involving plagiarism that she was informed she could present her own case but was not informed "she had a right of cross-examination, as provided in the student handbook."[129] The trial court remanded her case for a new hearing before the Committee on Discipline with instructions that "she be afforded the right to cross-examine any witnesses presented against her."[130]

While the right to counsel may not be viewed as a necessary requirement in all academic dishonesty cases, the right of cross-examination clearly is. And any impairment of that right will be viewed with suspicion by courts. In Clayton,[131] the discouragement of plaintiff's non-legal student advisor from serving as an advocate in cross-examination was sufficient to withstand the university's request for summary judgment. In Crook[132] the persistent interruption and cross-examination by committee members of plaintiff-student and the equally persistent refusal to allow plaintiff's attorney to cross-examine adverse witnesses were fatal to the university's cause.[133] In addition, the university "introduced into evidence over 100 unsworn letters and notes [addressed] 'to whom it may concern'"[134] which, of course, denied plaintiff and his attorney an opportunity to cross-examine their authors.

As important a right as cross-examination is, there are some legitimate restrictions which are justifiable. For example, in Crook the hearing committee chairman imposed a requirement that plaintiff's attorney could pass questions to the chair who might ask them.[135] Although the Crook court did not make reference to this procedure, some modification of what was done in Crook would seem to be permissible. Requiring all cross-examination to be addressed to the chair rather than the witness would seem to be acceptable as consistent with the judicial concern about a nonadversarial setting for academic dishonesty cases.[136] However, to permit the chair to elect which written questions should be asked, as was done in Crook, would probably be an unreasonable restriction on cross-examination. In Jaska, the court refused to uphold plaintiff's claim that he should be able to cross-examine the anonymous student who

reported plaintiff's cheating.[137] The Jaska court took a somewhat limited approach by restricting cross-examination only to those officials or teachers with primary knowledge of facts relevent to the proceeding.[138] The Jaska limitation regarding student informants should not be a problem in plagiarism situations because the instructor presumably would make an independent investigation regarding accuracy of the allegation of plagiarism before making any formal charge.

Right to a Hearing

The Supreme Court in Horowitz determined that "a hearing is not required by the due process clause of the fourteenth amendment."[139] However, that case also involved an exhaustive evaluative process that extended over several semesters and involved evaluation by a number of different faculty members. Plagiarism can be distinguished from the Horowitz set of facts where the issues focused on faculty members' subjective judgment concerning the student's clinical medicine performance. A charge of plagiarism is not a long-term subjective matter and, once proved, presumably could result in punishment for the student.

Although a student may not necessarily be entitled to a hearing before a formal tribunal in academic dishonesty situations, there are clearly two parameters which will affect that student's entitlement: provisions in the student handbook regarding a hearing and, at the very least, a minimal opportunity for the student to present evidence on his behalf and contest evidence against him. Clearly, written standards established by an institution regarding the hearing rights of a student in academic dishonesty cases such as plagiarism are controlling and deviations will be permitted only where the student would not otherwise be prejudiced.

The frequently referred to case of Crook v. Baker[140] is a worthwhile study of the problems an institution can create for itself when it deviates from established procedures. The University had a grievance appeal process for graduate students utilizing a three-member panel composed of faculty and students, but university officials not only eliminated all lower, mediatory steps of the process but they removed all student participation from the panel. The hearing officers became handpicked professors.[141] Despite assurance by the university's general counsel [142] that witness lists would be exchanged "the department produced unlisted witnesses at the hearing."[143] General counsel informed plaintiff's attorney prior to the hearing that the department's burden of proof in the recission of degree hearing was "clear and convincing standard of proof" but then informed the hearing committee in his opening statement that the burden of proof was "preponderance of the evidence."[144] In addition, the error was further exacerbated because the hearing committee chairman "placed the burden upon plaintiff to explain away the charges and the department was not required to meet any burden."[145] Plaintiff-student's attempt to present his explanation was punctuated

by frequent questions and contradictions from members of the department at the hearing; indeed the court observed that the transcript revealed the hearing to be "an all-day free for all."[146] During the hearing committee's post-hearing deliberations the department continued its investigation of plaintiff and furnished the committee with what appeared to be a considerable amount of ex parte evidence. Plaintiff's attorney objected, at no avail,[147] to this "post hearing evidentiary submission of the department as "violative of basic concepts of fairness."[148] There is little wonder that in overruling the university's decision to rescind the master's degree of plaintiff the federal district court observed.

> The arbitrary rescission of a degree, after a university has supposedly determined with all due deliberation that one has met all of the requirements for that degree, damages the university's academic integrity as much as, if not more than, the student's fraud in obtaining the degree.[149]

Presumably, the subsequent discovery by a faculty member of plagiarized assignments, or even a thesis or dissertation, could result in an institution's desire to rescind a degree. The Crook decision highlights two legal problems with fulfilling such a desire. The first is the authority of a school to rescind a degree where there is no express authority to do so in the institution's legal documents.[150] The second concerns the institution's adherence to its own hearing process and rules of procedure.

Other cases have indicated legal problems which can arise in hearings involving academic dishonesty. In Jaska v. Regents of the University of Michigan the federal district court indicated that some "procedural irregularities" can be permitted without violating constitutional standards.[151] The Jaska court found that a hearing held six weeks and five days after the charge of cheating was made, instead of the mandated six weeks, "did not constitute a denial of due process."[152] In addition, a requirement that members of the hearing panel be appointed by the student government could be altered for a hearing held during the summer months when most students are gone from the campus and the appointment could be accomplished by the academic judiciary.[153] Where such relatively minor procedural irregularities occur a court will tend to look at the results of the hearing and in Jaska the court noted that "there is nothing in the record to indicate that the panel's decision was anything less than impartial or fair."[154] However, where university rules call for a hearing panel and the student is provided only informal meetings with two deans and the president's assistant, such a substitution was not considered "sufficient compliance with the guideline."[155] In Ryan v. Hofstra University,[156] a disciplinary as opposed to academic dishonesty case, a student was entitled to a hearing before the Student Judiciary Board unless a student's record indicated "significant emo-

tional or psychological disturbance."[157] Where a student was denied appearance before the university's judiciary board the dean was held to have "acted arbitrarily and in abuse of discretion"[158] in denying plaintiff's appearance before the board.

Reasons for Discharge

The question as to whether a hearing panel must furnish written reasons supporting a "guilty" finding has been addressed occassionally by courts. In Jaska v. Regents of University of Michigan[159] a federal district court found adequate a statement to plaintiff-student from the hearing board that plaintiff had been found "guilty of cheating in Statistics 402 as a result of the case presented by Professor Rothman."[160] Although there is some indication that written reasons may be required in misconduct discipline cases,[161] such would not seem to be the situation in academic dishonesty cases, such as plagiarism, because as the court noted in Jaska: "Here, plaintiff had written notice of the specific charges against him and, due to the nature of the accusation, the reasons for the panel's decision were obvious."[162] By the nature of the offense, a charge of plagiarism would specify portions of student material alleged to have been plagiarized and thus a simple "guilty" finding would fit within the Jaska rationale. However, if intent to plagiarize is an issue it would seem to be advisable for a hearing panel to furnish a statement regarding the evidence supporting its finding of intent.[163] It would seem necessary for a hearing committee to comment about the credibility of witnesses, although one federal district felt compelled to discuss at length and in detail the credibility of witnesses on both sides.[164]

Appeal Process

Educational institutions invariably appear to have some form of internal appeal process beyond the hearing panel.[165] An appeal process serves important functions ranging from detection of procedural errors by the hearing panel to simple requests for clemency based on the student's particular situation. Thus it is important that the appeal itself be conducted with the same conformity to written guidelines and sense of fairness as the hearing panel.

Some of the kinds of problems identified with the appeal process are addressed below. One problems concerns the weight which the person or persons hearing the appeal are to give to the decision of the hearing panel. In Lyons v. Salve Regina College[166] the school's guidelines provided that following a hearing of the grade appeals committee . . . the recommendation of the committee is made to the Dean of Students/ Associate Dean of the College."[167] Two of the three committee members voted to award plaintiff-student an Incomplete in the course while the third would have awarded plaintiff an F and required plaintiff to apply

for reinstatement to the nursing program. On appeal the dean of the college overruled the majority and awarded plaintiff an F. The trial court found for plaintiff and ordered reinstatement of plaintiff into the nursing program.[168] In overturning the trial court the federal appeals court concluded, "[t]here is nothing in the instant record to indicate that a student at Salve Regina College had any rational basis for believing that the word 'recommendation' meant anything more than its normal everyday meaning."[169] Thus, the use of the term "recommendation" was viewed as nothing more than "an expression of the Committee's opinion as to the preferred course of conduct to be followed by the Dean."[170] In other words, the Committee's decision was advisory rather than mandatory.

However, where the weight of the hearing panel's decision is unclear a different result can occur. In Jones v. Board of Governors of the University of North Carolina[171] a student was charged with cheating on a final examination. A university student court had initially found plaintiff-student guilty of "academic dishonesty" but after a second hearing requested by the chancellor she was found not guilty of the cheating charge. Notwithstanding the hearing panel's decision the university counsel objected to the chancellor who referred the matter to the vice-chancellor for academic affairs. After reviewing the transcript the vice-chancellor awarded plaintiff a failing grade and placed her on disciplinary probation for one semester; but as a result of the failing grade she was dropped from the College of Nursing. The federal district court granted plaintiff's order for reinstatement[172] and the appeals court affirmed. In overruling the vice-chancellor's decision the appeals court found troublesome "the reviewing officer's rejection of the tribunal's determination, whether that determination was rendered as finding or as advice."[173] In other words, the Jones court appears to be stating that in the absence of evidence that a hearing panel's decision is advisory, an adverse appeal decision must have some "expression of reasons"[174] for the adverse decision.

Where a student has been found "not guilty" of a charge of academic dishonesty, such as plagiarism, it is expected that a school's internal appeal process will correct whatever penalties may have already been assessed against the student. In Lightsey v. King,[175] a student at the United States Merchant Marine Academy was found "not guilty" by its honor board of cheating on an examination. However, the faculty member who had brought the charge of cheating refused to credit plaintiff with the test score he received on the test, on which he allegedly cheated, and to change the F to a higher grade. The federal district court refused to consider this case as one involving academic discretion in grading and refused to countenance the academy's option of allowing the student to retake the exam.[176] In deciding for the student and ordering him to be credited with his test score the court relied on the academy's own regulations. "The Merchant Marine Academy chose to adopt regulations creating an Honor Board, and it

chose to vest that Board with authority over charges of lying, cheating or stealing made against Cadets."[177]

As a final note, it may be necessary to change the office or person who hears an appeal. Such changes would be permissible as long as they are supported by a reason that does not create any unfairness for the student. For example, in Crook v. Baker[178] the change of the office to which an appeal was taken was apparently acceptable because the person who occupied the office at the time of the appeal had earlier held a lower office and had been involved in bringing charges of fabricated evidence against plaintiff.[179]

Conclusion

Based upon available case law the following standards apply in plagiarism cases.

(1) A student should have some written indication of what he has plagiarized and the source from which the alleged plagiarized material was taken.

(2) Although there is no right to counsel in academic dishonesty cases, it is well to remember that courts will apply a fairness test, evaluating such items as the institution's use of an attorney and the complexity of the hearing panel's rules.

(3) There would seem to be no valid reason for not permitting a student accused of plagiarism the opportunity to cross-examine those who furnish testimony against him at the hearing; however, there would seem to be no problem in requiring that all questions be directed to the chairman for the sake of decorum.

(4) Although a student in a plagiarism situation, absent a school regulation to the contrary, may not be entitled to a hearing panel, he is entitled to appear before a school officer, hear evidence against him and offer evidence in his own behalf.

(5) Unless school rules require that reasons be given upon a finding that a student has commited the offense of plagiarism, the finding of guilty should in itself furnish sufficient reason.

(6) Some form of appeal process beyond the individual or committee that renders a decision regarding violation of plagiarism should be provided; however, any limitations upon the person or group hearing the appeal should be expressly made clear.

NOTES

56. Napolitano, 453 A.2d at 274.

57. Marx, Horowitz: A Defense Point of View, 13 J.L. & Educ. 51 (1984); Golden, College Student Dismissals and the Eldridge Factors: What Process is Due?, 8 J.C. & U.L. 495 (1981-82); Toombs & DiBaise, College Rules and Court Decisions: Notes on Student Dismissal, 2 J.C. & U.L. 355 (1975).

58. 435 U.S. 78 (1978).

59. 538 F.2d 1317, 1321 (8th Cir. 1976).

60. 435 U.S. at 83, 84. The Horowitz distinction between academic and disciplinary matters was subsequently followed by the Eighth Circuit in Hines v. Rinker, 667 F.2d 699 (8th Cir. 1981) in finding that it was not arbitrary and capricious conduct in violation of a student's alleged substantive due process rights for a faculty member to award a grade of F for a course even though such a grade would result in dismissal and even though the school had a provision for incomplete in a course and the professor had stated he would give incompletes rather than F's for his course.

61. Nordin, The Contract to Education: Toward a More Workable Theory of the Student-University Relationship, 8 J.C. & U.L. 141, 149 (1980-82). The author cites three other reasons: "the historical position of universities;" "education [as] an activity . . . charged with a public purpose;" "the nature of the educational process . . . to exercise judgment based on advanced learning and esoteric judgments." Id. at 148-49.

62. 453 A.2d at 275, quoting Horowitz, 435 U.S. at 98.

63. 453 A.2d at 271.

64. No. 82-247 (D. Vt. 1982).

65. Id. at 13.

66. Id.

67. Id. at 9.

68. 731 F.2d 529 (8th Cir. 1984).

69. Id. at 531 (emphasis added).

70. Id. at 530.

71. Id. at 532.

72. Id.

73. Id. "Cheating on exams is clearly an academic matter, and, in this case, the lying was directly related to the alleged cheating."

74. Id. at 533 (emphasis in original). See note 69 and accompanying test for governing university regulation.

75. Id. Corso was a diversity case and the federal court applied Nebraska law declaring "that where general and specific terms in a contract may relate to the same thing, the more specific provision should control."

76. See note 69 and accompanying test.

77. See notes 72-73 and accompanying text for the district court's rationale.

78. The concept that court will defer to an organization in certain areas but exercise judicial scrutiny in situations where neutral legal principles can be applied, such as contract law, is not unique to educational institutions. For example, the Supreme Court has long held that court may resolve church disputes as long as the court can decide civil matters without resolving underlying controversies over religious doctrine. See Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Serbian Orthodox Diocese v. Miliovojevich, 426 U.S. 696 (1975); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Watson v. Jones, 80 U.S. 679 (1871).

79. For other cases where the academic-nonacademic distinction in procedure has been upheld, see Jaska v. Regents of Univ. of Michigan, 597 F. Supp. 1245 (E.D. Mich. 1984); University of Houston v. Sabeti, 676 S.W.2d 685 (Tex. Civ. App. 1984); Tedeschi v. Wagner College, 404 N.E.2d 1302 (N.Y. 1980).

80. Horowitz, 435 U.S. at 97.

81. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Accord Ryan v. Surora City Bd. of Educ., 540 F.2d 222 (6th Cir. 1976); Skidmore v. Shamrock Indep. School Dist., 464 F.2d 605 (5th Cir. 1972); Miller v. School Dist., 500 F.2d 711 (7th Cir. 1974). (In Roth a university faculty member hired for a one-year teaching position had no statutory or contractual expectation of employment beyond that year and thus no constitutionally protected property right.)

82. North v. West Virginia Bd. of Regents, 233 S.E.2d 411 (W. Va. 1977); Pegram v. Nelson, 469 F. Supp. 1134 (M.D.N.C. 1979).

83. Ross v. Pennsylvania State University, 445 F. Supp. 147 (M.D. Pa. 1977); Barker v. Trustees of Bryn Mawr, 278 Pa. 121, 122 A. 220 (1923).

84. Perry v. Sindermann, 408 U.S. 593 (1972).

85. See Note, Common Law Rights for Private University Students: Beyond the State Action Principle 84 Yale L.J. 120 (1974); Note, Legal Relationship Between the Student and the Private College or University, 7 San Diego L. Rev. 244, 245 (1970). The Horowitz Court appeared to be very sensitive regarding the freedom of educational institutions to set academic standards: "A graduate or professional school is, after all, the best judge of its students' academic performance and their ability to master the required curriculum." 435 U.S. at 97 n.2.

86. See Nordin, supra note 61 at 167 and accompanying footnotes.

87. Horowitz 435 U.S. at 97 quoting Goss v. Lopez 419 U.S. at 584.

88. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

89. Board of Regents v. Roth, 408 U.S. at 573; Bishop v. Wood, 426 U.S. 341, 348 (1976).

90. Horowitz 435 U.S. at 97 with reference to Bishop v. Wood, 426 U.S. at 348. See also Paul v. Davis, 424 U.S. 693, 701 (1976) ("reputation alone, apart from some more tangible interest such as employment, is neither 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the due process clause").

91. Jaska v. Regents of Univ. of Michigan, 597 F. Supp. 1245 (E.D. Mich. 1984) (suspension for cheating on exam); Hall v. Medical College of Ohio, 742 F.2d 299 (6th Cir. 1984) (expulsion for academic dishonesty); Jones v. Board of Governors of Univ. of N.C., 704 F.2d 713 (4th Cir. 1983) (suspension for cheating); Lightsey v. King, 567 F. Supp. 645 (E.D.N.Y. 1983) (discharge from academy for cheating).

92. 584 F. Supp. 1531 (E.D. Mich. 1984).

93. Id. at 1554.

94. Id. at 1555.

95. Id., referring to Paul v. Davis, 424 U.S. 693 708-09 (1976).

96. 424 U.S. 319 (1976).

97. Id. at 335. For an application of this three-pronged test see Crook v. Baker, 584 F. Supp. 1556, 57.

98. Id. at 1556.

99. See Tedeschi v. Wagner, 404 N.E.2d 1302, 1305 (N.Y. 1980); Slaughter v. Brigham Young Univ., 514 F.2d 622, 625 (10th Cir. 1975); Clayton v. Trustees of Princeton Univ., 519 F. Supp. 802, 805 (D.N.J. 1981).

100. 473 N.Y.S.2d 843 (N.Y. App. Div. 1984).

101. Id. at 845.

102. 440 F. Supp. 1060 (N.D. Ga. 1977).

103. Id. at 1063.

104. 597 F. Supp. 1245 (E.D. Mich. 1984).

105. Id. at 1249.

106. Id. at 1248 n.2. The court's rationale was expressed as following:

> In this case [Horowitz], the proceedings against plaintiff primarily involved resolution of factual disputes, and there was little need for subjective judgment or evaluation. Further, dismissal for cheating requires greater procedural protection than academic dismissals since the former are more stigmatizing than the latter, and may have a greater impact on a student's future.

107. See supra notes 20-25 and accompanying text.

108. For an almost incredible scenario, see Crook v. Baker, 584 F. Supp. 1531 (E.D. Mich. 1984) where an investigation regarding alleged fabrication of data in a master's program was carried out in secret and the student's attorney had difficulty in acquiring access to information gathered by faculty members.

109. Hall v. Medical College of Ohio, 742 F.2d at 309, citing Horowitz at 97 n.8.

110. See Hall, supra note 109 at 309 and Crook, supra note 108 at 1539.

111. Horowitz, 435 U.S. at 89.

112. Napolitano, 453 A.2d at 282.

113. Id.

114. Id. See also Clayton v. Trustees of Princeton University, 519 F. Supp. 802 (D.N.J. 1981).

115. However, cases dealing with disciplinary proceedings for misconduct appear to require representation of counsel at discipline hearings. Compare Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972) (Due process clause requires representation by counsel at suspension hearings) and Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967), aff'd, 415 F.2d 1077 (8th Cir. 1969), cert. denied, 390 U.S. 965 (1970) (Due process clause requires representation by counsel at a suspension hearing.) with Madera v. Board of Education, 386 F.2d 778 (2d Cir. 1967), cert. denied, 390 U.S. 1028 (1968) (No right to counsel at a conference relating to the suspension of a student) and Everett v. Marcase, 426 F. Supp. 397 (E.D. Pa. 1977) (Due process does not require the presence of an attorney at a formal hearing on disciplinary transfers.)

116. Napolitano, 453 A.2d at 282.

117. 597 F. Supp. 1245 (E.D. Mich. 1984).

118. Id. at 1252.

119. Id.

120. Id.

121. Id. The Jaska court suggests this conclusion.

122. 519 F. Supp. 802 (D.N.J. 1981).

123. Id. at 807.

124. Id.

125. 584 F. Supp. 1531 (E.D. Mich. 1984).

126. Id. at 1557.

127. Id. at 1551-52. Attorneys who represent educational institutions would do well to read the judge's written reprimand of the General Counsel's handling of the academic hearing process.

128. Clayton, 519 F. Supp. at 807.

129. Napolitano, 453 A.2d at 281.

130. Id. at 281-82. The result of the rehearing remained unchanged; plaintiff's diploma was to be withheld for one year.

131. See Supra note 122.

132. See Supra note 125.

133. Id. at 1545, 1547, 1560.

134. Id. at 1543.

135. Id. at 1541.

136. See Mary M. v. Clark, 473 N.Y.S.2d 843, 845 (N.Y. App. Div. 1984); Jansen v. Emory University, 440 F. Supp. 1060, 1062-63 (N.D. Ga. 1977).

137. Jaska, 597 F. Supp. at 1253.

138. Id., citing Dillon v. Pulaski County Special School Dist., 468 F. Supp. 54, 58 (E.D. Ark. 1978). The policy underlying this position is that anonymity of student accusers is necessary to protect them from reprisals from other students.

139. Horowitz, 435 U.S. at 88 n.3.

140. 584 F. Supp. 1531 (E.D. Mich. 1984).

141. Id. at 1539.

142. The General Counsel initially limited his role as advisor to the department bringing charges against plaintiff to rescind his degree, but later compromised his position by advising the highest board of appeal in the Graduate School. Id. at 1549-50, 1552.

143. Id. at 1543.

144. Id. at 1543-44.

145. Id. at 1544.

146. Id. at 1545.

147. The diligent and persistent defense of his client throughout this case earned for plaintiff's attorney the plaudits of the federal court. "[T]he tenacity and ardor of his advocacy of the most fundamental principles upon which the republic rests throughout this unfortunate saga vindicates not only the University [of Michigan] which produced him, but that of the legal profession as well." Id. at 1552.

148. Id. at 1548.

149. Id. at 1557. (Emphases added).

150. Plaintiff's attorney raised this objection and the trial court discussed the issue without resolving it. The only authority for rescission of a degree is an old English case, Rex v. Cambridge University, 92 Eng. Rep. 818 (1723). Id. at 1544, 1556.

151. Jaska, 597 F. Supp. at 1251.

152. Id. at 1251, n.6.

153. Id.

154. Id.

155. Tedeschi v. Wagner College, 404 N.E.2d at 1306. The college's handbook provided for a board hearing if suspension or expulsion was "for any cause other than failure in his academic work." The court determined that there were factors in addition to academic at issue and therefore the student should have had a hearing. Id. at 1304, 1306.

156. 324 N.Y.S.2d 964 (N.Y. Sup. Ct. 1971).

157. Id. at 975.

158. Id.

159. 597 F. Supp. 1245 (E.D. Mich. 1984).

160. Id. at 1253.

161. Id.

162. Id. at 1254.

163. In Napolitano it appears that the court interpreted the hearing committee's guilty verdict as a nonacceptance of plaintiff's explanations regarding intent, especially in light of the committee's written summary of findings of intent based on the student's mosaic of plagiarism violations. 453 A.2d at 270, 276.

164. Crook v. Baker, 584 F. Supp. at 1551-52.

165. E.g., Princeton University, Rights, Rules, Responsibilities (1984) at 53; Liberty University, The Liberty Way (1984-86), at 16-17.

166. 565 F.2d 200 (1st Cir. 1977).

167. Id. at 201.

168. Lyons v. Salve Regina College, 422 F. Supp. 1354 (D.R.I. 1976).

169. Supra note 166 at 202-203.

170. Id. at 203.

171. 704 F.2d 713 (4th Cir. 1983).

172. 557 F. Supp. 263 (W.D.N.C. 1983).

173. Supra note 171 at 716.

174. Id.

175. 567 F. Supp. 645 (E.D.N.Y. 1983).

176. Id. at 648, 649.

177. Id. at 650.

178. 584 F. Supp. 1531 (E.D. Mich. 1984).

179. See Id. at 1550.

3

PREVENTING COPYRIGHT PROBLEMS

Overview of Copyright and Plagiarism

Copyright is a form of protection provided to authors of literary, dramatic, musical, artistic and certain other intellectual works,[180] whether or not the works are actually published.[181] The 1976 major revision of the 1909 Copyright Act was necessary because of the totally unanticipated and rapid use of technologically advanced communication techniques: radio, television, computers, videotapes and the electrostatistic copying system. The relative ease with which new technological devices permitted persons including students to reproduce intellectual property of another was perceived as unreasonably subverting the copyright owner's expectation of economic return.[182] The relative inexpensiveness of reproduction of copyright material today, as opposed to the purchase of copyright materials themselves, has obviously disturbed the equilibrium between the copyright owner's expectation of economic return and the student or faculty members use of that material.[183]

In general, the subject areas of copyright and plagiarism have some basic differences which need to be addressed at this introductory stage. Plagiarism, defined as a form of academic dishonesty, is a broader concept than copyright since plagiarism could apply to nondocumented use of material no longer copyrighted[184] or not copyrightable.[185] In addition, as will be discussed later, plagiarism could apply to material exempted from copyright coverage under fair use.[186] Although it could be possible to have a copyright violation without finding plagiarism,[187] it would seem more probable in such situations that copyright and plagiarism violations would overlap.

For the student who produces plagiarized works and/or the faculty member who uses such works in publications there are three key legal issues. The first focuses on ownership of the student-produced plagiarized material[188] and the second concerns fair use of copyrighted material. But even if the issue of authorship is resolved and the student work falls within the fair use exemption, the third issue concerns the extent to which plagiarized material is copyrightable.

Ownership of Student-Produced Work

The ownership question focuses upon the issue as to whether stu-

dent-produced materials such as theses and papers are works for hire. The Copyright Act includes within the definition of "works for hire," "answer material for a text"[189] but makes no mention of student papers or theses which would be the culmination of research. However, it should also be noted that ownership in such test answer material would not transfer from the student unless "the parties expressly agree in a written instrument signed by them that the work shall be considered a work for hire."[190] Absent such an instrument, a finding of a work for hire would depend on an employment relationship.[191]

Where items can be identified as works for hire, "the employer or person for whom the work was prepared is considered the author . . . unless the parties have expressly agreed otherwise in a written instrument signed by them."[192] Whether the faculty member or educational institution would be considered the copyright owner of a student's work product would seem to depend upon the nature of the student-institution relationship. It has been suggested that ownership as well as any requisite written agreement might be resolved under some concept of express or implied contract between the student and the institution.[193] The problem, of course, is that an institution or its faculty may have made no express statement in institutional publications or through oral representations regarding ownership of student-produced written works. Whether it is a reasonable expectation by students under the implied contract doctrine that they would lose ownership interest in all written work completed for class assignments would seem to be problematic.[194] Where such implied contract doctrine would interface with the Copyright Act it should be noted that courts are reluctant to expand protection under the copyright law absent explicit legislative guidance.[195] Likewise, courts are not reluctant to interpret the Copyright Act literally and give full effect and force to its provisions.[196] The real test as to whether a faculty member or institution as opposed to the student becomes the copyright owner of student-produced materials handed in as part of class assignments would seem to be if the faculty member or institution could publish the student assignments without copyright infringement. In view of the clear language of the Copyright Act that the author is the copyright owner,[197] absent some transfer of his copyright interest, it would seem that there would have to be an employment relationship or an express agreement signed by the student before his class assignments became the copyrighted property of the faculty member or educational institution.[198] Apart from student work completed as part of an employment relationship, provisions in institutional handbooks declaring transfer of student ownership rights to the faculty member or institution would not meet the Copyright Act's transfer requirement that a transfer must be "in writing and signed by the owner of the rights conveyed."[199]

The problem of copyright ownership affects plagiarism at two different levels. First, the publication of plagiarized material could result in a copyright infringement lawsuit to the extent that the plagiarism is also a violation of the Copyright Act. Second, tolerance of plagiarism in student assignments does little to encourage the thorough-

ness of research which is the necessary ingredient of scholarship and which brings credit upon the educational institution that produced the student. Both of these concerns raise the question of the relationship between student-produced work and the fair use exemption in the Copyright Act.

Fair Use

The concept of fair use of copyrighted material as exempt from copyright infringement has had a long history of litigation.[200] The 1976 Copyright Act provides an exemption from copyright infringement for reproduction of copyrighted material "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research . . . ."[201] Presumably, student papers or theses completed as part of an assignment would qualify as "scholarship or research" and therefore such work, as long as it passes only between the faculty member and student, should not represent a copyright violation. However, Congress has generated some confusion about the limits of fair use by adding the following language after the above-quoted exemption.

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:
> (1) the purpose and character of use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[202]

While the above language might suggest that extensive plagiarism by a student exceeds the fair use exemption, as a practical matter, student scholarship or research as a copyright problem is really a non-issue. There are no reported scholarship/fair use cases probably because multiple copies would most usually have to be involved to raise the fair use issue.[203] In addition a recent federal court declared that "in judicial interpretations of the Old Act and under the New Act as well, the doctrine of fair use is more liberally applied in non-commercial and nonprofit educational situations."[204] In an attempt to clarify fair use in an educational setting, three sets of guidelines were devised: (1) photocopying for classroom use, (2) photocopying of music, and (3) photocopying of interlibrary requests. These guidelines were negotiated between publishers, authors and respective professional organizations and subsequently incorporated into the legislative history of the 1976 law.[205] There is no question that these guidelines have substantially restricted unauthorized copying and use of copyrighted material.[206]

When a student plagiarizes material for a class assignment and then makes copies of that assignment for members of the class he might possibly be violating the copyright law, in addition to other discipline problems he may have created by his plagiarism. The Agreement on Guidelines for classroom copying contains the following language

> Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; provided that:
>
> A. The copying meets the tests of brevity and spontaneity as defined below; and
> B. Meets the cumulative effect test as defined below; and
> C. Each copy includes a notice of copyright.[207]

Although the above guidelines contemplated materials copied and distributed by a teacher, they likewise would apply to materials written, copied and distributed by students. While the "scholarship and research" aspect of fair use might protect his single copy plagiarism from copyright infringement, multiple copying of his plagiarized work may have infringement implications.

Although the likelihood of an infringement action for distribution of multiple plagiarized copies of copyright materials within the classrooms would be extremely remote there is always the possibility that the student himself may publish the plagiarized paper and then face an ininfringement lawsuit for damages and injunctive relief. In the 1976 Copyright Act, Congress provided for a system of statutory damages which the copyright owner may elect to receive rather than sue for actual damages and profits. Infringements, other than willful, range from a minimum of $250 to a maximum of $10,000.[208] Awards for willful violations can be raised as high as $50,000.[209] However, in the case of copyright violations where the "infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $100.[210] But for an agent or employee of an educational institution acting in the scope of his employment who "believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use" the court "shall remit statutory damages."[211] Where a student has both plagiarized and violated the Copyright Act and has been instructed by the faculty member to make and distribute multiple photocopies, such an assignment could conceivably be treated as the faculty member's (an employee) act and permit remission of damages; such would be the case only if there were no willful violation by the faculty member, presumably indicated by his knowledge of a copyright violation.[212]

The person who elected to publish the plagiarized work in violation of copyright would bear the responsibility for infringement. In a lawsuit where there is the possibility of reduction in or remission of damages a question that may be critical is whether knowledge of plagiarism can be imputed as a willful violation of the Copyright Act. Such a con-

cern raises issues addressed earlier. For example, to the student author the issue may be whether or not he understands the schools definition of plagiarism. For the faculty member, the issues may focus on a multiple number of problems--knowledge of published materials in his field, understanding of and willingness to enforce the institution's plagiarism policy, and ownership of the student's work.

There are almost no cases testing the relationship between plagiarism and copyright, but the recent case of Marcus v. Rowley[213] raised some of the problems addressed above. Plaintiff Marcus had developed a 35 page booklet, "Cake Decorating Made Easy," for sale[214] to students in her class. Each copy of her booklet contained the copyright symbol, an encircled "c," followed by "1975 Eloise Marcus."[215] Plaintiff at no time gave anyone permission to copy her booklet. Defendant Rowley, a teacher in the same district as plaintiff, had enrolled in plaintiff's course and had purchased plaintiff's booklet. Defendant prepared her own "Cake Decorating Learning Activity Package" ("LAP") for use in her food service career class; eleven of 24 pages of the LAP were copied from plaintiff's booklet with no credit given to plaintiff. Defendant did not sell her LAP but had 15 copies made and placed in a file for use by her students. Plaintiff first learned of defendant's copying when a student in her class refused to buy her booklet. The student's son then obtained a copy of defendant Rowley's LAP and "the student accused plaintiff of plagiarizing Rowley's work."[206] Plaintiff brought a copyright suit against defendant Rowley and the school district. The trial court dismissed the complaint on the grounds that "defendant's copying of the plaintiff's material for nonprofit educational purposes constituted fair use."[217] The federal appeals court reversed and remanded the case "for a determination of damages pursuant to the provisions of the Copyright Act."[218]

The Marcus court's analysis of the four fair use factors in section 107 of the Copyright Act[219] is worth considering, especially as it impacts plagiarism. Regarding the purpose and character of the use the court observed that use of material "for the same intrinsic purpose for which the copyright owner intended it to be used is strong indicia of no fair use."[200] The Marcus case dealt with two booklets used for essentially the same kind of class. In addressing the second factor, the nature of the copyrighted work, the court noted that "the scope of fair use is greater when informational as opposed to more creative products, are involved."[221] The Marcus defendant's LAP contained both kinds of material so no conclusion was reached on this factor. Concerning the amount and substantiality the court declared that "whatever may be the breadth of the doctrine of 'fair use,' it is not conceivable to us that the copying of all, or substantially all, of a copyrighted [item] can be held to be a 'fair use' merely because the infringer had no intent to infringe."[222] In Marcus defendant had copied approximately 50% of plaintiff's booklet and that 50% contained virtually all of the substance of defendant's LAP. Regarding the fourth factor, effect of the use upon the potential market for or value of the copyrighted work, the court declared that "the mere absence of measurable pecuniary damage does not require a finding of

fair use."[223]

To the extent that a plagiarized work violates one or more of the factors in section 107 of the Copyright Act, the plagiarizer would seem to have infringed upon the copyright owner's protected interest. Although the plagiarized term paper written for a class assignment is probably exempt from copyright infringement, there could be a problem if multiple copies are made or if the paper is published. Such could especially be the case where one source is predominantly relied upon in the plagiarized paper, as was the situation in Napolitano.[224] Presumably, the same rationale should apply to these or dissertations completed as part of a curricular program requirement.

Copyrightability of Plagiarized Material

Whether student assignments contain plagiarized material that could be copyrighted impacts upon topics already discussed--copyright ownership and copyright infringement lawsuits. Copyright protection has traditionally been granted only to works manifesting three characteristics. First, copyright requires authorship[225] which in turn requires originality. Originality means "little more than a prohibition of actual copying"[226] and does not require that the work be novel.[227] The plagiarist obviously fails this first test, at least as to material he had copied or borrowed, because he is not an independent producer.[228] Second, a work must be fixed in some medium of expression so that it is identifiable.[229] Third, the work must evidence some creative intellectual effort.[230] Excluded from copyright protection are short phrases or slogans,[231] insubstantial changes in public domain works,[232] lists of ingredients, instructions or brief statements of facts.[233] The essential question is "whether the work reflects sufficient intellectual effort to justify copyright, or whether, the quantum of authorship is too small to merit notice."[234]

The basic property interest of copyright in prohibiting copying[235] extends only to copyrightable portions of the author's output,[236] to the form in which ideas are expressed,[237] and to substantial similarity in copying.[238] To the extent that a student plagiarist could claim authorship, and hence copyrightability, such authorship would apply only to portions of his medium of expression that meet the requirements of copyright. The mere fact that the student's work does not violate the Copyright Act does not mean his work is copyrightable or that he has not plagiarized. For example, a student who has copied or borrowed, without appropriate attribution, material from works of the United States Government has not infringed copyright, but the student has committed plagiarism.[239] Beyond the categories of expression not protected by the Copyright Act[240] every student needs to beware that as long as his work "is substantially similar to that of the [copyright owner] (and is the product of copying rather than independent effort), it will constitute an infringement of the [owner's] protected 'expression.'"[241]

NOTES

180. 17 U.S.C. § 102 (a). The owner of a copyright has certain exclusive rights, including:
   (1) to reproduce the copyright work in copies or phonorecords;
   (2) to prepare derivative works based upon the copyrighted work;
   (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
   (4) in the case of literary, musical, dramatic and choreographic works, pantomimes and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
   (5) in the case of literary, musical dramatic, and choreographic works, pantomimes, and pictoral, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

181. Publication is no longer the key to statutory copyright under the 1976 Act as it was under the prior 1906 Act. Under the new Act, copyright attaches when "a work is 'fixed' in a tangible medium of expression" and even publication without notice of copyright no longer automatically invalidates a copyright; omission of copyright notice generally can be corrected within five years. 17 U.S.C. §§ 101, 405, 406.

182. See Mawdsley & Permuth, Multiple Photocopying in Educational Institutions, 10 NOLPE Sch. L.J. 18, 20 (1981).

183. See L. Seltzer, Exemptions and Fair Use in Copyright 37 (1978).

184. E.g., any work on which copyright has expired. See 17 U.S.C. §§ 301-305, or works in the public domain, Alexander v. Haley, 460 F. Supp. 40, 45 (S.D.N.Y. 1978).

185. E.g., any work of the United States Government. 17 U.S.C. § 105.

186. Fair use exempts use of copyrighted material "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research...." 17 U.S.C. § 107.

187. Attribution or appropriate documentation would seemingly prevent a charge of plagiarism but where attributed material published beyond the classroom setting exceeds the definition of fair use

there would be a copyright violation. See Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983). The reason for this difference between copyright and plagiarism is that the former is concerned with the use of material which differs from the matters of documentation. See infra note 201 and accompanying text.

188. Plagiarized works, or at least that portion of a work which is plagiarized, do not qualify for coyright protection. See infra notes 225-228 and accompanying text.

189. 17 U.S.C. § 101.

190. Id. at 101 (2).

191. Id. at 101 (1). Absent an actual employer-employee relationship as in a research assistant position, simply being a student should not establish such a relationship. See Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170 (Ind. 1983). See also R. Mawdsley, Athletic Aid Agreements: Area Student-Athletes Employees of Educational Institutions?, 12 West's Educ. L. Rptr. 9 (1983).

192. 17 U.S.C. § 201 (b).

193. This is the position taken in Rapp, 3 Education Law ¶14.01 [2] [b] (1985).

194. For a discussion of "reasonable expectations" as a definition for an implied contract to educate, see Nordin, The Contract to Educate: Toward A More Workable Theory of the Student-University Relationship, 8 J.C. & U.L. 158-165 (1980-82).

195. Sony Corp. of America v. Universal City Studios, 104 S. Ct. 774 (1974); Teleprompter Corp. v. CBS, 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists, 392 U.S. 390 (1968); White-Smith Music Publishing Co. v. Apollo Co., 208 U.S. 1 (1908); Williams & Wilkins v. United States, 487 F.2d 1345 (Ct. Cl. 1973), aff'd 420 U.S. 376 (1975).

196. See, e.g., Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 568 F. Supp. 494 (W.D. Pa. 1983) (rooms at video retail rental outlet for viewing rental videocassettes constituted public performance in violations of 17 U.S.C. §§ 101, 106 (4)); Encyclopedia Britannica Educ. Corp. v. Crooks, 558 F. Supp. 1247 (W.D.N.Y. 1983) (exhibition of copyrighted works by cooperative educational services board on cable television to students in classrooms in New York State constituted a public performance); Sailor Music v. Gap Stores, Inc., 668 F.2d 84 (2d Cir. 1981) (playing copyrighted music over ceiling speakers in clothing shop constitutes a public performance). See also M. Nimmer, Nimmer on Copyright

§ 8.14 [c] [1] (1984). For an excellent discussion of how the Copyright Act would be applied to the showing of rental video-cassettes to groups of students, see T. Boland & T. Szykowny, Copyright Infringement?--Video Cassettes on Campus, 23 West's Educ. L. Rptr. 11 (1985).

197. The copyright owner is the person who fixes a created work in a copy or tangible medium of expression. 17 U.S.C. § 101, 201 (a). In the case of students, that person would be the student himself when he prepares and completes the paper, thesis or other assignment to be handed in.

198. In researching this matter and in discussing this question with an attorney in the Copyright Office, there are apparently no reported cases where students have attempted to sue because of faculty or institutional publication of student-produced materials without permission from the student. Whether such reluctance is due to ignorance by students of copyright law or is because of fear of faculty reprisals is difficult to know. For a federal district court's observation regarding the credibility of a Ph.D. candidate's observation regarding the credibility of a Ph.D. candidate's testimony in a non-copyright related academic dishonesty case, see Crook v. Baker, 584 F. Supp. 1531, 1546-47 (E.D. Mich. 1984).

199. 17 U.S.C. § 204; see also §§ 101, 201 (b). This position appears to be supported in M. Nimmer, 1 Nimmer on Copyright § 5.03 (1984).

200. For a discussion of fair use and citations to relevant cases see, L. Seltzer, Exemptions and Fair Use in Copyright (1978); Cardoza, To Copy or Not to Copy For Teaching and Scholarship: What Shall I Tell My Client?, 1977 J. C. & U. L. 60; Rosenfield, Customary Use as "Fair Use' in Copyright Law, 25 Buffalo L. Rev. 119 (1975); Nimmer, Copyright § 145, 643-644 (1969).

201. 17 U.S.C. § 107. This statutory formulation was not intended to advance or change the law, only to codify the case law criteria. Notes of the Committee on the Judiciary, H.R. No. 94-1476.

202. Id. (emphasis added).

203. Rapp, 3 Education Law § 14.02 [2] (1985).

204. Encyclopedia Britannica Educ. Corp v. Crooks, 542 F. Supp. 828 (W.D.N.Y. 1982).

205. The guidelines applying to photocopying for classroom use are so fraught with interpretive difficulties as to create more problems than they cure. For a critical discussion, see R. Mawdsley &

S. Permuth, Multiple Photocopying in Educational Institutions, 10 NOLPE Sch. L.J. 19 (1981).

206. See R. Mawdsley & S. Permuth, Copyright Laws: Practices and Limitations, School Law in Changing Times 194 (1982). For accounts of some of the litigation against educational institutions, see R. Mawdsley & S. Permuth, Legal Problems of Religious and Private Schools 101 (1983); Palmer, Publishers Withdraw Lawsuit Charging NYU and Professors with Copyright Infringement, 26 Chronicle of Higher Education 1 (April 20, 1983).

207. Agreement on Guidelines for Classroom Copying in Non-For-Profit Educational Institutions, reprinted in 1975 U.S. Code Cong. and Ad. News, 5659, 5681-5682. It is worth noting that all three definitions--brevity, spontaneity and cumulative effect--must be met or the photocopying violates the Guidlines.

208. 17 U.S.C. § 504 [c] [1]. In an infringement action for statutory damages against Longwood College that was settled out of court, the College agreed to pay the copyright owners $500 for each of the five songs used without permission and $17,500 in attorney fees. For an account of the case, see 28 Bull. of Copyright of the U.S.A. 221-22. (Dec. 1980).

209. 17 U.S.C. § 504 (c) (2).

210. Id.

211. Id.

212. Id. The burden of proof is on the infringer to prove that he "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright."

213. 695 F.2d 1171 (9th Cir. 1983). Since the facts of this case arose prior to the January 1, 1978 effective date of the 1976 Copyright Act, this case was decided under the earlier 1909 law; however, the court noted that the new law's "Section 107 codifies the factors developed under the prior case law." Id. at 1174.

214. Plaintiff sold the booklet to her students for $2 each, $1 of which was her profit. Id. at 1173.

215. Under the 1976 Copyright Act, failure to include the copyright notice does not necessarily invalidate the copyright in a work. See 17 U.S.C. § 405.

216. Marcus, 695 F.2d at 1173.

217. Id. at 1174.

218. Id. at 1179.

219. See supra note 201 and accompanying text.

220. Marcus, 695 F.2d at 1175.

221. Id. at 1176, quoting Universal City Studios v. Sony Corp., 659 F.2d 963, 972 (9th Cir. 1981).

222. Id. at 1177, quoting Wihtol v. Crow, 309 F.2d 777, 780 (8th Cir. 1962).

223. Id.

224. See. 453 A.2d at 267. Plaintiff-student testified that the book from which she copied or borrowed material was the only book to which she referred in writing her paper.

225. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1814) (the author is "he to whom anything owes its origin; originator; maker"). See also Goldstine v. California, 412 U.S. 546, 561 (1973).

226. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 (2d Cir. 1951), quoting Hoague-Sprague Corp. v. Frank C. Meyer Co., 31 F.2d 583, 586 (2d Cir. 1929).

227. See Lee v. Runge, 404 U.S. 887 (1971).

228. Judge Learned Hand's assessment of this test and the plagiarist is well worth noting:

> Borrowed the work must indeed not be, for a plagiarist is not himself pro tanto an 'author'; but if by some magic a man who had ever known it were to compose a new Keat's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keat's.

Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir.), Cert. denied, 298 U.S. 669 (1936).

229. See 17 U.S.C. § 102.

230. Creative effort can be treated as part of originality but probably should be better considered as an independent matter. Compare M. Nimmer, 1 Nimmer on Copyright § 2.01 [B] (1978) with R. Denicola, Copyright in Collections of Facts: A Theory for the Protection of

Nonfiction Literary Works, 81 C.L. Rev. 516, 521 (1981).

231. See 37 C.F.R. § 202.1 (9) (1980); see also Smith v. George E. Muehlebach Brewing Co., 140 F. Supp. 729 (W.D. Mo. 1956).

232. L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir.) cert. denied, 429 U.S. 857 (1976); Russ Berrie & Co. v. Jerry Elsner & Co., 482 F. Supp. 980 (S.D.N.Y. 1980); Grove Press, Inc. v. Collectors Pub., Inc., 264 F. Supp. 603 (C.D. Cal. 1967).

233. See 1 M. Nimmer, § 201 [B] (1978).

234. Denicola, supra note 230 at 522.

235. Nazer v. Stein, 347 U.S. 201, 218 (1954) ("Absent copying there can be no infringement of copyright"). See F.E.L. Publication, Ltd. v. Catholic Bishop of Chicago, 1981 Copyright Law Dec. 16, 321 (N.D. Ill. 1981).

236. The distinction between original and nonoriginal author contributions is recognized in the Copyright Act and in court decisions. See 17 U.S.C. § 103 (b) and Musto v. Meyer, 434 F. Supp. 32 (S.D. N.Y. 1977), aff'd mem., 598 F.2d 609 (2d Cir. 1979); Russ Berrie & Co. v. Jerry Elsner Co., 482 F. Supp. 980 (S.D.N.Y. 1980); Synercom Technology, Inc. v. University Computing Co., 462 F. Supp. 1003 (N.D. Tex. 1978).

237. The Copyright Act protects only the medium of expression and protection does not extend to "any idea, procedure, process, method of operation, concept, principle, or discovery." 17 U.S.C. § 102 (b). See also Hopkins, Ideas, Their Time Has Come: An Argument and a Proposal for Copyrighting Ideas, 46 Alb. L. Rev. 443 (1982). See generally M. Nimmer, 3 Nimmer on Copyright § 13.03 [A] [1] (1980). Even the copying of a person's expressions may be permissible where prohibition would run contrary to the constitutional guarantees of free speech and free press. See Falwell v. Penthouse International, 1981 Copyright Law Dec. 16846 (W.D. Va. 1981). Likewise, oral lectures or statements are not protected until fixed in some medium of expression. 17 U.S.C. § 101. See, Comment, Copyrighting Conversations: Applying the 1976 Copyright Act to Interviews, 31 Am. U.L. Rev. 1071 (1982).

238. See 3 Nimmer on Copyright, § 13.03. The relationship between fair use and similarity of the copied material has a long and varied judicial history. E.g., see MCA v. Earl Wilson, 1981 Copyright Law Dec. Paramount Picture Corp., 1981 Copyright Law Dec. 16621 (S.D.N.Y. 1981) (similarity between short story and motion picture).

239. See 17 U.S.C. § 105. See generally 1 Nimmer on Copyright § 5.06; Tesansky, Copyright in Government Employee Authored Works, 30 Cath. U.L. Rev. 605 (1981).

240. See supra notes 185-187 and accompanying text.

241. 2 Nimmer on Copyrights § 8.01 [G] (1984). Paraphrasing can be as actionable as copying. See Universal Athletic Sales Co. v. Salkeld, 376 F. Supp. 514 (W.D. Pa. 174) (" . . . it makes no difference whether it was copied by freehand copying or by tracing.") rev'd on other grounds (but this point affirmed) 511 F.2d 904 (3d Cir. 1975); see generally Nimmer, § 13.03 [A] [1].

4

CONCLUSION

Plagiarism is a real and persistent problem for educational institutions. The dearth of reported plagiarism cases probably reflects the satisfactory handling of such problems within an institution's academic discipline system. But the few number of cases may also reflect faculty ignorance of the plagiarized works, uncertainty about the institution's definition of plagiarism, or perhaps even an unwillingness to confront a student with evidence of plagiarism. While it would not be reasonable to expect faculty members to be so knowledgeable in their fields that all copying would be detected, it is reasonable for the school to have a clearly defined and explained plagiarism policy. It is probably too great an assumption that many of today's students will understand and be able to apply dictionary-type definitions of plagiarism. Although a school may not have a legal duty to do so, it most assuredly would be performing an invaluable service to its student-clientele by augmenting its definition of plagiarism with examples such as are found in the Appendix to this monograph.

When students are charged with plagiarism offenses it is important that they be afforded at least a minimum fairness in treatment. While there will be some differences between private and public institutions, due to the application of the fourteenth amendment due process clause to public institutions, there are guidelines that should apply to all. First, all schools must adhere to the procedures in their handbooks, with deviations permitted only where the inapplicability of the published procedure would be obvious and reasonable. Second, the student must have a clear explanation of what material of his is plagiarism, including the source from which the plagiarized material was copied. The burden of proof will be on the school to prove that plagiarism occurred, not on the student to prove the absence of plagiarism. Third, the student should have an opportunity to appear before the individual or panel provided for in academic disicipline situations and present his case. He should have the opportunity to confront and cross-examine the witnesses against him. His right to an attorney or non-legal advisor will depend upon the institution's procedures as well as the school's use of an attorney in his case. The student has every right to expect that the hearing individual or panel will make its decision based only on evidence presented at the hearing and that those making the decision will do so in an impartial manner. Fourth, there should be some appeal process to another individual or panel. The mandatory effect of the hearing decision as well as the scope of review need to be made clear

to the student, either in published form or through practice.

Students, faculty members and educational institutions need to be knowledgeable about the copyright infringement implications of student produced plagiarized material. While student plagiarism only in the context of a class assignment would seem to be fair use, any use of that material by a faculty member might not only implicate himself but also his employer institution in a copyright infringement lawsuit. Obviously, students who have passed through a school plagiarizing material as a regular practice for class assignments may have a rather brutal awakening when such practice is transferred from the protected school environment to the post-school commercial world. Clearly, the best preparation for students to obviate such a painful learning experience would be to make a greater institutional commitment in explaining and enforcing plagiarism.

Permission has been granted by Edward J. Shanahan, Dean of Dartmouth College at Hanover, New Hampshire for NOLPE to reproduce the Appendix from *Sources: Their Use and Acknowledgment* by Harold L. Bond, Thaddeus Seymour, and John L. Stewart. Copyrighted in 1982 by Trustees of Dartmouth College.

A letter dated April 15, 1985, granting permission for use of the plagiarism policy of Dartmouth College in this monograph, is on file at the NOLPE office in Topeka, Kansas.

APPENDIX

Disciplinary Penalties for Plagiarism

The tradition of intellectual integrity at Dartmouth is fundamental to the ideals to which the life and work of the College are dedicated. The faculty expects and assumes that written work represents original thought unless otherwise acknowledged, and plagiarism is considered a form of intellectual larceny which has no place in a community of scholars.

Unfortunately, specific examples of plagiarism do occur each year. The Committee on Standards (COS) is faced with its most painful disciplinary duty, and the offenders are suddenly confronted by deep personal tragedy which permanently damages their records and reputations and causes inestimable heartbreak to their families. Dismissal for dishonesty has often barred students from graduate schools, commissions in the service, professional careers, and responsible employment.

This booklet has explained in detail both the principles and practices of scholarly acknowledgment, and the COS will assume each student's understanding of its contents in considering any future cases of plagiarism. The following pages are devoted to five actual examples of plagiarized writing submitted for credit at Dartmouth (it should be noted that the examples are drawn from the time when Dartmouth was an all-male institution). Students will benefit from reading them with care and comparing critically the paper with its source.

From: Caroline F. E. Spurgeon, *Shakespeare's Imagery* (Cambridge, 1935), pp. 335-36.

The main image in *Othello* is that of animals in action, preying upon one another, mischievous, lascivious, cruel or suffering, and through these, the general sense of pain and unpleasantness is much increased and kept constantly before us.

More than half the animal images in the play are Iago's, and all these are contemptuous or repellent: a plague of flies, a quarrelsome dog, the recurrent image of bird-snaring, leading asses by the nose, a spider catching a fly, beating an offenceless dog, wild cats, wolves, goats and monkeys.

To these, Othello adds his pictures of foul toads breeding in a cistern, summer flies in the shambles, the ill-boding raven over the infected house, a toad in a dungeon, the monster 'too hideous to be shown', bird-snaring again, aspics' tongues, crocodiles' tears, and his reiteration of 'goats and monkeys'. In addition, Lodovico very suitably calls Iago 'that viper', and the green-eyed monster 'begot upon itself, born on itself', is described or referred to by Iago, Emilia and Desdemona.

It is interesting to compare the animal imagery in *Othello* with that in *King Lear*. The plays have certain likenesses; they were written near together (*Othello* probably in 1604, *King Lear* about 1605), they are the most painful of the great tragedies, and they are both studies of torture. But the torture in *King Lear* is on so vast and so inhuman a scale, the cruelty of child to parent in the doubly repeated plot is so relentless and ferocious, that the jealous and petty malignity of Iago shrinks beside it.

This difference in scale is expressed in the animal imagery. In *Othello* we see a low type of life, insects and reptiles, swarming and preying on each other, not out of special ferocity, but just in accordance with their natural instincts, mischievous and irresponsible wild cats, goats and monkeys, or the harmless, innocent animal trapped or beaten. This reflects and repeats the spectacle of the wanton torture of one human being by another, which we witness in the tragedy, the human spider and his fly; whereas in *King Lear* our imagination is filled with the accumulated pictures of active ferocity, of wolf, tiger, wild boar, vulture, serpent and sea-monster, all animals of a certain dignity and grandeur, though seen here only when their desires

Are wolvish, bloody, starved and ravenous.

EXAMPLE 1

The main image in Othello is that of animals in action. We see a low type of life, insects and reptiles, swarming and preying on each other, not out of special ferocity but because of their natural instincts.

The majority of the animal images in the play are Iago's, and all of these are contemptuous or repellent. He refers to a plague of flies, a quarrelsome dog, bird-snaring, leading asses by the nose, a spider catching a fly, beating an offenseless dog, wildcats, goats and monkeys. Through these images, the general sense of pain and unpleasantness is increased and kept constantly before us.

To these, Othello adds his pictures of foul toads breeding in a cistern, summer flies in the shambles, the ill-boding raven over the infected house, a toad in a dungeon, the monster 'too hideous to be shown' (III, iii, 107), aspics' tongues, crocodiles' tears, and his reiteration of 'goats and monkeys' (III, iii, 403).

COMMENT: A quick glance at the first sentence will show that this excerpt is obvious plagiarism; the student copied his source *word for word* without acknowledgment. However, the student took pains to rearrange sentences to make his dishonesty less obvious, therefore the second sentence in his paper is copied from the last paragraph of the source as it appears on the opposite page. Thereafter, he has followed a similar procedure, mixing up the sentences copied verbatim from the source. The result is a "mosaic" (see p. 7 above).

Notice that he has made a few word changes to suit his point of view and to compound the deception. In his second paragraph he has changed "more than half" to read "the majority of," and he has added "he refers to" in place of the colon in the source. He has also added references to the Shakespeare quotations to make his examples appear more genuinely the product of his own research.

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From: Caroline F. E. Spurgeon, *Shakespeare's Imagery* (Cambridge, 1935), pp. 335-36.

The main image in *Othello* is that of animals in action, preying upon one another, mischievous, lascivious, cruel or suffering, and through these, the general sense of pain and unpleasantness is much increased and kept constantly before us.

More than half the animal images in the play are Iago's, and all these are contemptuous or repellent: a plague of flies, a quarrelsome dog, the recurrent image of bird-snaring, leading asses by the nose, a spider catching a fly, beating an offenceless dog, wild cats, wolves, goats and monkeys.

To these, Othello adds his pictures of foul toads breeding in a cistern, summer flies in the shambles, the ill-boding raven over the infected house, a toad in a dungeon, the monster 'too hideous to be shown', bird-snaring again, aspics' tongues, crocodiles' tears, and his reiteration of 'goats and monkeys'. In addition, Lodovico very suitably calls Iago 'that viper', and the green-eyed monster 'begot upon itself, born on itself', is described or referred to by Iago, Emilia and Desdemona.

It is interesting to compare the animal imagery in *Othello* with that in *King Lear*. The plays have certain likenesses; they were written near together (*Othello* probably in 1604, *King Lear* about 1605), they are the most painful of the great tragedies, and they are both studies of torture. But the torture in *King Lear* is on so vast and so inhuman a scale, the cruelty of child to parent in the doubly repeated plot is so relentless and ferocious, that the jealous and petty malignity of Iago shrinks beside it.

EXAMPLE 2

I believe that **the main image in Shakespeare's tragedy, Othello, is that of animals. These creatures are constantly in action, preying upon one another, and they are depicted as mischievous, wanton, cruel or suffering. By Shakespeare's ingenious use of these animal images, the general sense of pain and unpleasantness** that pervades the entire story, **is much increased and kept constantly before the reader.**

More than half the animal images in the play are those of Iago, the scheming ensign who has been refused the office of Othello's lieutenant, second in command of the Venetian army. In direct parallel to Iago's hatred for Othello and Cassio, the successful incumbent for the high military position, all Iago's images are contemptuous or repellent. These symbols are represented as a plague of flies, a quarrelsome dog, the recurrent image of bird-snaring, leading asses by the nose, a spider catching a fly, beating an offenseless dog, wild cats, wolves, goats and monkeys.

To Iago's many images, Othello adds his pictures of foul toads breeding in a cistern, summer flies in the shambles, and the ill-boding raven over the infected house. The Moor also continues with such signs as a toad in a dungeon, the monster "too hideous to be shown", bird snaring, aspics' tongues, crocodiles' tears, and his repetition of goats and monkeys.

As one may readily see, Shakespeare did not in the least restrain his use of these symbols. Whether they were employed by one character as a means of slander against another, or in the oppo-

This difference in scale is expressed in the animal imagery. In *Othello* we see a low type of life, insects and reptiles, swarming and preying on each other, not out of special ferocity, but just in accordance with their natural instincts, mischievous and irresponsible wild cats, goats and monkeys, or the harmless, innocent animal trapped or beaten. This reflects and repeats the spectacle of the wanton torture of one human being by another, which we witness in the tragedy, the human spider and his fly; whereas in *King Lear* our imagination is filled with the accumulated pictures of active ferocity, of wolf, tiger, wild boar, vulture, serpent and sea-monster, all animals of a certain dignity and grandeur, though seen here only when their desires

> Are wolvish, bloody, starved and ravenous.

This represents the terrific scale of the suffering in *King Lear*, which makes us feel—as we never do in *Othello*—that the vileness of humanity is so great, so unchecked and universal that if the gods do not intervene, the end of such horrors must come and

> Humanity must perforce prey on itself,
> Like monsters of the deep.

But the gods, who 'keep this dreadful pother', do not intervene, and the most terrible lines in Shakespeare are those breathed by Gloucester in his agony, when he attributes to the gods themselves in their dealings with men, not only indifference and callousness, but the sheer wanton delight in torture, which, in *Othello*, we see exercised only by one human being on another.

site function, as praise for another's ability, strength, or what have you, the popular practice is maintained by all the characters. Further examples of this may be seen in Lodovico's **very suitably calling Iago "that viper."** In the third scene of the third act, jealousy, **the green-eyed monster "begot upon itself, born on itself", is described or referred to by Iago, Emilia, and Desdemona.**

It is quite evident in reading Othello, that the play is a study of torture. The tragedy depicts **a low type of life, insects and reptiles, swarming and preying on each other.** These creatures, which may be construed to be describing the characters of the play, **are not out of special ferocity, but just in accordance with their natural instincts, mischievous and irresponsible wild cats, goats, and monkeys, or the harmless, innocent animal, trapped or beaten. This reflects** the scenes of the unrestrained **torture of one human being by another.**

COMMENT: This student used the same source as the previous example. Though his plagiarism may appear less obvious because of the many words he has changed, it is in fact more dishonest because of his opening assertion, "I believe." These are not *his* beliefs; they are Miss Spurgeon's and he has simply lifted them.

He has gone to considerable trouble to rearrange and rephrase his source. He has made three sentences out of the first one in his source, moving the word "action" to his second sentence and the concept of "pain and unpleasantness" to his third. The first paragraph in his source ends with "before us," and he concludes his first paragraph with "before the reader."

It is important to realize that although he has changed the words, he has not changed the ideas. And the assignment he was fulfilling was to record in a paper *his* ideas about *Othello*. The extent of his dishonesty is in no way diminished by his efforts to modify or paraphrase his source.

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56
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From: Cleanth Brooks, Jr. and Robert Penn Warren, *Understanding Poetry* (New York, 1943), pp. 296-98.

PORTRAIT

E. E. Cummings (1894-

Buffalo Bill's
defunct
who used to
ride a watersmooth-silver
stallion
and break onetwothreefourfive pigeonsjustlikethat
Jesus
he was a handsome man
and what i want to know is
how do you like your blueeyed boy
Mister Death

This poem essentially deals with a very usual theme and treats that theme simply. Death claims all men, even the strongest and most glamorous. How does the poet in treating such a common theme manage to give a fresh and strong impression of it? He might have achieved this effect of course in a number of different ways, and as a matter of fact, the general device which he employs is not simply one device: it is complex. In this case however, the most prominent element is the unconventional attitude which he takes toward a conventional subject, and in this particular poem, the matter of tone is isolated sufficiently for us to examine it rather easily (though we must not forget either that there are other matters to be examined in this poem or that tone is a factor in every poem).

In the first place, what is the difference between writing

Buffalo Bill's
Defunct

and

Buffalo Bill's
Dead?

The first carries something of a tone of conscious irreverence. The poet here does not approach the idea of death with the usual and expected respect for the dead. He is matter-of-fact, unawed, and even somewhat flippant and joking. But the things which he picks out to comment on in Buffalo Bill make a strong contrast with the idea of death. The picture called up is one of tremendous vitality and speed: for example, the stallion is mentioned and is described as "watersmooth-silver." The adjective contains not only a visual description of the horse which Buffalo Bill rode but a kinetic description is implied too. How was the horse "watersmooth"? Smooth, graceful, in

action. (The poet by running the words together in the next line is perhaps telling us how to read the line, running the words together to give the effect of speed. The way the poem is printed on the page is designed probably to serve the same purpose, the line divisions being intended as a kind of arrangement for punctuation and emphasis. But the odd typography is not of fundamental importance.) The "portrait" of Buffalo Bill given here after the statement that he is "defunct" is a glimpse of him in action breaking five claypigeons in rapid succession as he flashes by on his stallion—the sort of glimpse which one might remember from the performance of the Wild West show in which Buffalo Bill used to star. The exclamation which follows is exactly the sort of burst of boyish approval which might be struck from a boy seeing him in action or remembering him as he saw him. And the quality of "handsome" applies, one feels, not merely to his face but to his whole figure in action.

The next lines carry on the tone of unabashed, unawed, slangy irreverence toward death. Death becomes "Mister Death." The implied figure of the spectator at a performance of the Wild West show helps justify the language and manner of expression used here, making us feel that it is in character. But the question as asked here strikes us on another level. It is a question which no boy would ask; it is indeed one of the old unanswerable questions. But here it is transformed by the tone into something fresh and startling. Moreover, the dashing, glamorous character of the old Indian fighter gets a sharp emphasis. The question may be paraphraxed like this: death, you don't get lads like him every day, do you? The way the uestion is put implies several things. First, it implies the pathos at the fact that even a man who had such enormous vitality and unfailing youthfulness, had to die. But this pathos is not insisted upon; rather, it is presented indirectly and ironically because of the bantering and flippant attitude given in the question, especially in the phrases, "Mister Death" and "blueeyed boy." And in the question, which sums up the whole poem, we also are given the impression that death is not terrible for Buffalo Bill—it is "Mister Death" who stands in some sort of fatherly and prideful relation to the "blueeyed boy."

In attempting to state what the tone is here we have perhaps distorted it somewhat in trying to state it specifically. There are perhaps additional aspects of interpretation of the tone used in this poem. But what has been said above is perhaps nearly enough complete to let us see how important an element the tone of the poem is. In this case—a case as we have already noted in which it is easy to deal with the tone in some isolation—it is the *tone* which transforms what might be easily a hackneyed and dead poem into something fresh and startling

EXAMPLE 3

Cummings' poem, Portrait, deals with what is a rather common theme, and he treats that theme simply. Death claims all men, even the strongest and most glamorous.

How does the poet, in treating such a common theme, manage to give a fresh and strong impression of it?/In this case, I believe the most prominent element is the unconventional attitude which he takes toward a conventional subject, and in this particular poem, the matter of tone is isolated sufficiently for me to examine it./

"Buffalo Bill's
defunct"/

Carries something of a tone of conscious irreverence—death is treated somewhat flippantly and jokingly.

The poet goes on to paint us a picture of strong vitality and speed in order to contrast the usual and expected idea of death. The adjective, "watersmooth-silver," used to describe Buffalo Bill's "Stallion" appeals to the reader's sense of both sight and movement. The portrait of Buffalo Bill given after the statement that he is "defunct" is a glimpse of him in action breaking five claypigeons in rapid succession. In a very few words the poet has managed to capture the brilliance of his subject's past. Thru memory he is living again for the reader.

The next and last few lines carry on the tone of unabashed, unawed irreverence toward death. Death is referred to as "Mister Death." The implied figure of the spectator at a Wild West show helps justify the language and manner of expression used here, making us feel that it is in character.

"How do you like your blueeyed boy Mister Death?" The way this question is put implies several things. First, there exists pity in the realization that even such a dashing, youthful man must die. This attitude is presented indirectly and ironically by Cummings. It is not harped upon, for the question gives us the impression that death is not terrible for Buffalo Bill—"Mister Death" is portrayed as the father figure welcoming his "blueeyed boy."

I certainly have not given an exhaustive account of the tone of this poem, but I hope that what I've written has illustrated, to a certain extent, how important an element tone can be.

COMMENT: The student in this paper has simply abbreviated the passage to suit his purposes, and his direct dependence is obvious. However, his guilt apparently was not obvious to him, at least according to his testimony before the committee of the English Department which reviewed his case. In reporting the case to the Faculty Committee on Administration, the Chairman gave the following account: "He claimed that he had, on a visit to a girl of his acquaintance, been shown the book, and had at that time jotted down certain notes as a possible aid in the writing of a paper. Later, when he came to write his paper, he made use of these notes without any consciousness that he was repeating the words of the book. He describes the results as simply 'following along the same trend as the book'; and even when confronted with the parallel texts, alludes to the reproductions as 'occasional similarities.'"

Students should take great care to take proper notes in order to avoid unwitting plagiarism, for the Committee on Administration does not accept this explanation as a valid excuse. Whatever the procedure of composition, the result is plagiarism.

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From: Penguin Classics edition of Voltaire's *Candide*, translated by John Butt, by permission of the publishers, Penguin Books, Inc., 3300 Clipper Mill Road, Baltimore 11, Maryland.

Ridiculous as it seemed to her, she was still in love with life, in spite of everything she had been through. And that was true of the rest. Even Martin, who comes as near as any character to speaking with Voltaire's voice, is resigned rather than dejected, and takes a cynical pleasure in bursting bubble after bubble of hope as it springs in Candide's breast.... He pays a visit to a noble Venetian, who has all that money can buy and yet disdains it all. 'You must admit,' says Candide to Martin, 'that there is the happiest man alive, because he is superior to all he possesses'; but Candide admits, when pressed, that it is an empty life where nothing gives pleasure.

EXAMPLE 4

Even though it seemed ridiculous to the old woman herself, she was still in love with life. Martin, who can be said to be Voltaire's voice in the story, is resigned rather than dejected, and takes great pleasure in smashing every ounce of hope Candide contracts. One good example of this is where Candide and Martin go to see Count Pococurante. This man is supposed to be worry-free, and Candide believes this. Martin is in his glory when the Count rips apart all the arts. Nevertheless, Candide says, "You must admit that there is the happiest man alive, because he is superior to all he possesses."

COMMENT: This example is particularly significant. The student plagiarized his paper from the Introduction to *Candide*. He claimed that his work was not dishonest because he was drawing from the "book" on which he was reporting. In fact he was drawing from the introduction to the book and the ideas of John Butt, the translator. Very few words are copied, but he still has relied completely on the ideas and examples of his source. The result is misrepresentation and thus plagiarism.

Notice that he has simply modified the phraseology to correspond to his own style of writing. He has changed Butt's wording ("and takes a cynical pleasure in bursting bubble after bubble of hope as it springs in Candide's breast") in an attempt to make it sound more natural ("and takes great pleasure in smashing every ounce of hope Candide contracts"). He has looked up the name of the "noble Venetian" and changed the wording to "Count Pococurante."

Students must realize that such material must be acknowledged and that failure to give proper credit is dishonest. The writer of this paper was supposed to be recording his critical interpretation of *Candide*, but he has in fact simply repeated the ideas of John Butt.

From: Lily B. Campbell, *Shakespeare's Tragic Heroes* (Cambridge, 1930), p. 213.

In both Macbeth and Lady Macbeth there is seen the ambition which moves to rash deeds; in both there is seen the gradual dissolution of fear, the one being led to final self-destruction, the other to the final fury of despair.

Yet it is of "brave Macbeth" that we first hear, for as I have said, the study of fear is placed against a background of its opposite. The bleeding captain tells of Macbeth, who is "Valour's minion", fighting Macdonwald,

> Till he unseam'd him from the nave to the chaps,
> and fix'd his head upon our battlements.

Moreover, a fresh assault failed to dismay Banquo and Macbeth, so that the captain reports to Duncan:

> If I say sooth, I must report they were
> As cannons overcharg'd with double cracks; so they
> Doubly redoubled strokes upon the foe.
> Except they meant to bathe in reeking wounds,
> Or memorized another Golgotha,
> I cannot tell.

Macbeth is, indeed, "Bellona's bridegroom", though critics seem rather at a loss to know just who Bellona's bridegroom may have been. At any rate, we have pictured at the outset the military courage which in the captain's report seems bloody and rash and definitely pictured as an excess of fortitude, and which may well be ranked as one of the types specially listed by Aristotle as false courage.

EXAMPLE 5

In Lady Macbeth there can be seen the ambition which motivates their accomplishing rash deeds, and in both can be seen the gradual dissolution of fear which leads one to suicide and the other to a final fury of despair. In order to place fear against a backdrop of courage, Shakespeare establishes Macbeth as a man of bravery and fortitude comparable only to Othello. Although the reader never has "visible" proof of Macbeth's courage, he is referred to as "valour's minion" and "Bellona's bridegroom" and is established in our minds as a man of great courage.

COMMENT: This brief example is taken from a lengthy paper on *Macbeth*. Throughout the twelve pages of his discussion the student followed the ideas and continuity of Miss Campbell although the wording was largely his own. The result is a simple précis, and his indebtedness is no less than has been demonstrated in the previous examples. He has simply digested and abbreviated her examples, but he is taking credit for them as his own original conclusions. His unacknowledged dependence upon ideas drawn from someone else's work is intellectually dishonest. He has misrepresented his own knowledge, understanding, and interpretation of the play.

It must be remembered that the extent of dishonesty is not reduced by the amount of the writing which is cast in the student's own words. If he is repeating ideas without acknowledgment, he is plagiarizing.

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